141-213

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

No. 583. 289

A. HENRY SCHUTZ, JULIUS SCHUTZ, AND HENRY BLATH, PLAINTIFFS IN ERROR,

vs.

EBEN D. JORDAN, JAMES C. JORDAN, AND EBEN D. JORDAN, JR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 24, 1887.

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INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate, &c.	2	1
Transcript from State court	3	2
Affidavit of A. Henry Schutz	3	2
Undertaking on attachment	5	3
Notice of warrant of attachment	8	4
Order substituting attorneys for defendants	10	5
Consent substituting attorneys for defendants	11	5
Petition for removal	12	6
Bond for removal	16	7
Clerk's certificate	19	9
Order granting motion to amend summons, complaint, &c.	20	10
Answer	22	10
Notice of appearance for defendants	29	14
Summons	30	14
Complaint	32	15
Order granting motion to amend summons, complaint, &c.	34	15
Notice of trial	36	16
Minutes of trial	37	17
Judgment	38	17
Opinion of Judge Wheeler	40	18

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	Original	Print.
Order overruling motion for new trial	64	29
Consent as to time to amend bill of exceptions, &c.	66	29
Assignment of errors	66	29
Bond	74	31
Citation	78	33
Proof of service of citation	79	33
Stipulation making bill of exceptions part of record	80	33
Bill of exceptions	82	34
Plaintiffs' case	82	34
Bill of items	83	34
Testimony of James M. Robinson	89	38
Exhibit A—Remittance sheet, August 7, 1885	108	50
Testimony of James Kenny	110	51
Frank M. Gregory	110	51
George Dawson	110	51
Depositions of Daniel Lovery *et al.* read in evidence	110	51
Testimony of Lizzie J. Blaksley	111	51
Alfred C. Hertz	112	52
A. Judson Dunlap	113	52
William Lippman	113	53
Defendants' case	114	53
Testimony of Lewis C. Mott	114	53
Exhibit B—Remittance sheet, July 1, 1885	114	53
C—Remittance sheet, July 9, 1885	115	54
D—Check, July 1, 1885	116	54
E—Receipt, July 3, 1885	117	55
F—Check, July 9, 1885	131	63
G—Receipt, July 10, 1885	131	64
H—Receipt, August 10, 1885	133	64
I—Letter, Schutz Bros. & Blath to Jordan, Marsh & Co., August 24, 1885	134	65
K—Letter, Jordan, Marsh & Co. to Schutz Bros. & Blath, August 25, 1885	137	67
No. 13—Letter, Schutz Bros. & Blath to Jordan, Marsh & Co., August 26, 1885	138	67
Letters and telegrams	146	71
Testimony of Joseph M. Bassett	153	75
Exhibit M—Letter, Schutz Bros. & Blath to Jordan, Marsh & Co., October 2, 1885	160	80
N—Letter, Jordan, Marsh & Co. to Schutz Bros. & Blath, October 6, 1885	160	80
O—Letter, Jordan, Marsh & Co. to Schutz Bros. & Blath, October 10, 1885	161	80
P—Letter, Jordan, Marsh & Co. to Schutz Bros. & Blath, October 12, 1885	161	80
Q—Letter, Schutz Bros. & Blath to Jordan, Marsh & Co., September 18, 1885	161	81
R—Letter, Jordan, Marsh & Co. to Schutz Bros. & Blath, September 21, 1885	162	81
Testimony of John H. Hewes	177	90
John T. Gardhan	230	120
Eben D. Jordan	233	122
Alfred Shore	245	128

	Original.	Print.
Plaintiffs' case continued	247	129
Testimony of Lewis C. Mott (recalled)	247	129
Edwin F. Porter	247	130
J. M. Robinson (recalled)	248	130
Henry Blath	251	132
Exhibit No. 19—Letter of Hewes to Blath, August 7, 1885	253	132
Testimony of Julius Schutz	265	140
Aaron H. Schutz	276	147
Defendants' case continued	278	148
Testimony of William H. Warner	278	148
Plaintiffs' case continued	279	148
Testimony of Julius Schutz (recalled)	279	148
Charge to the jury	280	149
Plaintiffs' requests as to questions of law	305	162
Plaintiffs' requests as to questions of fact	309	164
Defendants' Exhibit A A—Bill of June 28, 1885	313	166
B B—Bill of July 6, 1885	314	167
C C—Bill of July 7, 1885	315	168
D D—Bill of July 7, 1885	316	168
E E—Bill of July 6, 1885	317	169
I I—Bill of July 3, 1885	318	169
H H—Bill of July 7, 1885	319	170
F F—Bill of July 6, 1885	320	170
G G—Bill of July 3, 1885	321	171
S—Bill of June 28, 1885	322	171
T—Bill of June 30, 1885	323	172
U—Bill of June 30, 1885	324	172
V—Bill of June 30, 1885	325	173
W—Bill of June 29, 1885	326	173
X—Bill of June 28, 1885	327	174
Y—Bill of June 28, 1885	328	174
Z—Bill of June 28, 1885	329	175
Stipulation as to bill of exceptions	330	175
Judge's certificate	330	176
Clerk's certificate	332	177

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between A. Henry Schultz, Julius Schultz, and Henry Blath, plaintiffs, and Eben D. Jordan, James C. Jordan, and Eben D. Jordan, Jr., defendants, a maifest error hath happened, to the great damage of the said A. Henry Schultz, Julius Schultz, and Henry Blath, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the fourth Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15 day of September, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

Seal of U. S. Circuit Court, South. Dist., New York.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Foregoing writ allowed September 15th, 1887.
E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to seventy-nine, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of A. Henry Schultz, Julius Schultz, and Henry Blath, plaintiffs in error, against Eben D. Jordan, James C. Jordan, and Eben D. Jor-

dan, Jr., defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 22d day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

Seal of U. S. Circuit Court, South. Dist., New York.

TIMOTHY GRIFFITH, *Clerk.*

[Endorsed:] E. & A. A. 702. A. Henry Schultz *et al. v.* Eben D. Jordan *et al.* Writ of error. Receipt of a copy of the within is admitted. Sept. 15, 1887. Stern & Myers, def'ts' sol's.

[Stamped:] U. S. circuit court. Sep. 16, 1887. Timothy Griffith, clerk.

3 N. Y. Supreme Court, City and County of New York.

AARON HENRY SCHUTZ, JULIUS SCHUTZ, and HENRY BLATH
vs.
EBEN D. JORDAN, CHARLES MARSH, and J. C. JORDAN.

CITY AND COUNTY OF NEW YORK, *ss:*

A. Henry Schutz, being. duly sworn, says that he is one of the plaintiffs above named, who, at the times hereinafter mentioned, were and still are copartners under the firm name of Schutz Brothers & Blath, doing business in the city of New York.

That the defendants at like times were and still are copartners under the firm name of Jordan, Marsh & Co.

That the plaintiffs have a good cause of action against the said defendants to recover the sum of thirty-two thousand six hundred and four and $\frac{99}{100}$ dollars, arising out of a breach of contract for goods sold and delivered, which cause of action arose upon the following state of facts:

That at various times between the 7th of May, 1884, and the 20th of July, 1885, the said plaintiffs, at the request of the said
4 defendants and at prices agreed upon, sold and delivered to the said defendants goods, wares, and merchandise amounting altogether at such agreed prices to the sum of thirty-two thousand six hundred and four and $\frac{99}{100}$ dollars, which amount the said defendants promised and agreed to pay and no part of which has been paid, although the same is due and payable.

That the plaintiffs are justly entitled to recover from the said defendants the said sum of thirty-two thousand six hundred and four and $\frac{99}{100}$ dollars over and above any and all counter-claims known to the plaintiffs or to this deponent, and this action is brought to recover the said sum.

Deponent further alleges that none of the said defendants reside in the State of New York, but that each of them is a resident of the city of Boston, State of Massachusetts.

Deponent therefore applies for a warrant of attachment against the property of the said defendants, for which no previous application has been made to any court or judge.

A. HENRY SCHUTZ.

Sworn to before me this 4th day of September, 1885.

The words "although the same is due and payable" interlined above before signing and before verification.

HENRY V. ROTHSCHILD,
Com. of Deeds, N. Y.

Endorsed: "Filed September 25th, 1885."

5 N. Y. Supreme Court.

A. HENRY SCHUTZ, JULIUS SCHUTZ, & HENRY BLATH, Plaintiffs,
against
EBEN D. JORDAN, CHARLES MARSH, & J. C. JORDAN, Defendants.

Undertaking on Attachment.

The above-named plaintiffs having applied to one of the justices of this court for a warrant of attachment against the property of the above-named defendants, Eben D. Jordan, Charles Marsh, & J. C. Jordan, under and by virtue of the code of civil procedure, as being non-residents of the State of New York—

We, Benjamin Lippman, of No. 175 E. 60th street, in the city of New York, and Lewis C. Mott, of No. 118 E. 128th street, in the city of New York, do hereby, jointly and severally, undertake that if the defendants recover judgment in this action or if the warrant of attachment is vacated the plaintiffs above named will pay all costs which may be awarded to the above-named defendants and all damages which the said defendants may sustain by reason of the said attachment not exceeding the sum of five hundred dollars.

Dated N. Y., Sept. 23rd, 1885.

BENJAMIN LIPPMAN.
LEWIS C. MOTT.

6 CITY AND COUNTY OF NEW YORK, *ss:*

Benjamin Lippman, being sworn, says that he is a resident and a householder within the State of New York and worth double the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

BENJAMIN LIPPMAN.

Sworn to before me this 22nd day of September, 1885.

MILTON S. GUITERMAN,
Com. of Deeds, N. Y. City & Co.

CITY AND COUNTY OF NEW YORK, *ss:*

Lewis C. Mott, being sworn, says that he is a resident and a householder within the State of New York and worth double the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

LEWIS C. MOTT.

Sworn to before me this 22nd day of September, 1885.

MILTON S. GUITEMAN,
Com. of Deeds, N. Y. City & Co.

CITY & COUNTY OF NEW YORK, *ss:*

I certify that on this 22nd day of September, 1885, before me personally appeared the above-named Benjamin Lippman and Lewis
C. Mott, to me severally known and known to me to be the
7 individuals described in and who executed the above undertaking, and severally acknowledged to me that they executed the same.

MILTON S. GUITERMAN,
Com. of Deeds, N. Y.

(Endorsed:) N. Y. supreme court. A. Henry Schutz *et al.*, plaintiffs, against Eben Jordan *et al.*, defendants. Undertaking on attachment. Blumensteil & Hirsch, pl'ffs' att'ys, 320 B'way, N. Y. city. Approved this 25th day of Sept., 1885. C. Donohue, justice. Filed September 25th, 1885.

8 N. Y. Supreme Court, City & County of New York.

A. HENRY SCHULTZ, JULIUS SCHULTZ, and HENRY BLATH
against
EBEN D. JORDAN, CHARLES MARSH, and JAMES C. JORDAN, EBEN D. JORDAN, Jr.

Notice is hereby given that a warrant of attachment against the property of the defendants above named was on the 26th day of September duly granted by one of the justices of this court, and on the same day issued to the sheriff of the city and county of New York in this action, which is brought by A. Henry Schultz, Julius Schultz, and Henry Blath, as plaintiffs, against Eben D. Jordan, Charles Marsh, and James C. Jordan, and Eben D. Jordan, Jr., as defendants, to recover the sum of $32,604.99, which is the amount of plaintiffs' claim, as stated in said warrant. The description of the particular property levied upon is as follows:

All that certain lot of land situate in the fifth ward of the city of New York, beginning at a point on the westerly side of Church street, distant 72 feet 7¼ inches southerly from the corner formed by the intersection of the westerly line of said Church street with the

9 southerly line of White street, and running thence westerly and parallel or nearly so with White street aforesaid 75 feet 2 inches; thence northerly and partly through the centre line of a party wall and parallel or nearly so with Church street 72 feet 10½ inches to the southerly line of said White street; thence westerly along the southerly line of White street 25 feet 1¼ inches to the centre line of a party wall; thence southerly and partly through centre of a party wall and parallel or nearly so with said Church street 122 feet 8 inches; thence easterly and parallel or nearly so with White street 100 feet and 4 inches to the westerly side of said Church street 50 feet 1¼ inches to the point or place of beginning, be the said dimensions more or less, the said premises being composed of three separate lots of land known as 184 & 186 Church street and number 25 White St.

BLUMEMSTIEL & HIRSCH,
Pl'ff's Att'ys, 320 B'way, N. Y. City.

To the clerk of the city and county of New York:

Will index against Eben D. Jordan, Charles Marsh, James C Jordan, and Eben D. Jordan, Jr.

BLUMENSTIEL & HIRSCH,
Pl'ffs Att'ys.

(Endorsed:) Filed & recorded September 28th, 1885, 3 h. 45 m.

10 At a special term of the supreme court held in and for the city and county of New York, at the county court-house, on the 16th day of November, 1885.

Present: Hon. George P. Andrews, justice.

A. HENRY SCHUTZ & Others, Pl'ffs,
vs.
EBEN D. JORDAN & Others, Def'ts.

On the annexed consent of Mess. Marsh, Wilson & Wallis, and on motion of Stern & Myers, it is—

Ordered that said Stern & Myers be, and they hereby are, substituted in place and stead of said Marsh, Wilson & Wallis as attorneys for the defendants herein.

Enter.

G. P. A., *J.*

Endorsed: "Filed November 16th, 1885."

11 N. Y. Supreme Court.

AARON HENRY SCHUTZ and Others
against
EBEN E JORDAN and Others.

It is hereby consented that Stern & Myers be substituted in our

place and stead as attorneys for the defendants in the above-entitled action, and that an order to that effect may be entered hereon.

Dated New York, November 13th, 1885.

MARSH, WILSON & WALLIS,
Defendants' Attorneys.

12 New York Supreme Court, City and County of New York.

A. HENRY SCHUTZ, JULIUS SCHUTZ, & HENRY BLATH, Plaintiffs,
against
EBEN D. JORDAN, CHARLES MARSH, and JAMES C. JORDAN, Defendants.

To the honorable the supreme court of the State of New York for the city and county of New York:

The petition of Eben D. Jordan, Charles Marsh, and James C. Jordan, by Stern and Myers, their attorneys, respectfully shows—

That your petitioners are the sole defendants in the above-entitled action; that this action is a civil action at law, and was commenced on or about the 25th day of September, 1885.

That issue has been joined by the service of defendants' answer herein.

That all the plaintiffs herein, at the time of the commencement of this action, were and have ever since been citizens and residents of the State of New York; that all your petitioners, the said defendants, at the time of the commencement of this action, were and have ever since been citizens of the Commonwealth of Massachusetts and

13 resided in the city of Boston, in said Commonwealth.

That this action is brought by the plaintiffs to recover the sum of thirty-two thousand six hundred and four $\frac{99}{100}$ ($32,604.99) as damages for an alleged breach of contract; that there is a controversy herein between citizens of different States, and that the matter in dispute herein exceeds, exclusive of costs, the sum or value of five hundred dollars.

That this action is now pending and undetermined in this court; that the same has never been tried, and that there has not been any term of this court at which the same could be tried.

And your petitioners offer herewith a bond with good and sufficient surety for their entering in the circuit court of the United States for the southern district of New York, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court of the United States if this court shall hold that this action is improperly removed thereto.

Wherefore your petitioners pray that this court proceed no further herein, excepting to receive this their petition and said bond and to approve the said bond, and that this action be removed into the circuit court of the United States for the southern district of New York, for which relief no previous application has been made.

And your petitioners will ever pray, etc.

STERN & MEYERS,
14 *Att'ys for Petitioners.*

Office & P. O. address, 40 Wall St., New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

Simon H. Stern, being duly sworn, says that he is a member of the firm of Stern & Myers and one of the attorneys for the petitioning defendants herein; that the foregoing petition is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that this verification is made by deponent because none of the said petitioners is within the city and county of New York, where the said attorneys reside and have their office; that the ground of deponent's belief as to all matters in the foregoing petition not stated upon his knowledge are communications and correspondence had with said petitioners and their agents.

SIMON H. STERN.

Sworn to before me this 25th day of Nov., 1885.

H. A. KINGSBURY,
Notary Public, N. Y. City.

Endorsed: "Filed November 25th, 1885."

15 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

CLERK'S OFFICE OF SUPERIOR COURT.

I, Jos. A. Willard, of Boston, in said county, duly elected, qualified, and sworn as clerk of the superior court for the within said county and Commonwealth, dwelling in Boston, in said county, said court being a court of record, with a seal, which is hereto affixed, the records and seal of which court I have the custody, do herein and hereby, in the performance of my duty as said clerk, certify and attest that Lawrence Bond, Esq., before whom the annexed affidavit, proof, or acknowledgement was taken and subscribed, is a notary public for and within said county, duly appointed, commissioned, qualified, sworn, and authorized by the laws of said Commonwealth to act as such, and also duly authorized by the laws of said Commonwealth to take affidavits and certify proofs and acknowledgments of deeds of conveyances for lands, tenements, hereditaments lying and being in said Commonwealth; that he was at the time of taking the affidavit, proof, or acknowledgment hereto annexed such notary public; that I am well acquainted with his signature and handwriting and I verily believe that the signature to the said affidavit, proof, or acknowledgment is genuine; and, further, that the annexed instrument is executed and acknowledged according to the laws of said Commonwealth.

Witness my hand and the seal of said court, at Boston, in said county and Commonwealth, this 24th day of Nov., A. D. 1885.

JOS. A. WILLARD, *Clerk.*

16 Know all men by these presents that we, Eben D. Jordan, Charles Marsh, James C. Jordon, and Eben D. Jordon, Jr., as principals, and James J. Smith, residing at No. 37 Sterling Place, Brooklyn, New York, and Seth M. Milliken, residing at 990 Madison Ave., New York city, as sureties, are held and firmly bound unto A. Henry Schutz, Julius Schutz, and Henry Blath, their and each of their executors, administrators, and assigns, in the sum of five hundred dollars ($500), lawful money of the United States, to be paid to the said A. Henry Schutz, Julius Schutz, and Henry Blath, their and each of their executors, administrators, or assigns, for which payment, well and truly be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the 29th day of November, 1885.

Whereas the above-named A. Henry Schutz, Julius Schutz, and Henry Blath have heretofore brought an action of a civil nature, at law, in the supreme court of the State of New York for the city and county of New York, against the above-bounden Eben D. Jordon, Charles Marsh, and James C. Jordon; and whereas the said defendants in said action are about to petition the said court for the removal of said action into the circuit court of the United States for the southern district of New York:

Now, the condition of this obligation is such that if the said defendants shall enter in the said circuit court of the United States for the southern district of New York, on the first day of its
17 next session a copy, of the record in such action and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said action was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

EBEN D. JORDON. [L. S.]
CHAS. MARSH. [L. S.]
JAMES C. JORDON. [L. S.]
EBEN D. JORDON. [L. S.]
JAMES J. SMITH. [L. S.]
SETH M. MILLIKEN. [L. S.]

Signed and sealed in the presence of—the word and erased and the word or interlined on this page before execution; also the words and Eben D. Jordon, Jr., erased on page one before execution—

LAWRENCE BOND,
To C. M., E. D. J., J. C. J., & E. D. J., Jr.
H. A. KINGSBURY,
As to J. S. S. & A. M. M.

CITY AND COUNTY OF NEW YORK, *ss:*

James J. Smith, being duly sworn, says that he is one of the sureties on the foregoing bond; that he is a resident and householder within the State of New York and is worth double the amount of said bond over and above all his debts and liabilities which he owes

or has incurred and exclusive of property exempt by law from levy and sale under an execution.

JAMES J. SMITH.

Sworn to before me this 21st day of November, 1885.

H. A. KINGSBURY,
Notary Public, N. Y. Co.

18

CITY AND COUNTY OF NEW YORK, *ss:*

Seth M. Milliken, being duly sworn, says that he is one of the sureties on the foregoing bond; that he is a resident and freeholder within the State of New York and is worth double the amount of said bond over and above all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

SETH M. MILLIKEN.

Sworn to before me this 21st day of November, 1885.

H. A. KINGSBURY,
Notary Public, N. Y. Co.

STATE OF MASSACHUSETTS, *County of Suffolk,* } *ss:*

On this 20th day of November, 1885, before me personally appeared Eben D. Jordon, Charles Marsh, James C. Jordon, and Eben D. Jordon, Jr., all to me known and known to me to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

LAWRENCE BOND,
Notary Public.

19 STATE OF NEW YORK, *City and County of New York,* } *ss:*

On this 21st day of November, 1885, before me personally appeared James J. Smith and Seth M. Milliken, both to me known and known to me to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

H. A. KINGSBURY,
Notary Public, N. Y. Co.

Endorsed: "Filed November 25th, 1885."

STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, Patrick Keenan, clerk of the said city and county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original record on file in my office, and that the same is a correct transcript therefrom and the whole of such original.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 1st day of December, 1885.

[SEAL.] PATRICK KEENAN, *Clerk.*

(Endorsed:) U. S. circuit court, southern district of N. Y. A. Henry Schutz *et al. vs.* Eben D. Jordon *et al.* Certified copy record of supreme court State of New York. Blumenstiel & Hirsch, attorneys for plaintiffs, 320 Broadway, N. Y. city. U. S. circuit court. Filed Dec. 2, 1885. Timothy Griffith, clerk.

20 At a stated term of the circuit court of the United States held in and for the southern district of New York, in the second circuit, in the court-house, city of New York, the 4th day of December, 1885.

Present: Hon. Wm. J. Wallace, judge.

A. HENRY SCHUTZ *et al.*
vs.
EBEN D. JORDON *et al.*

The motion for leave to amend the summons and complaint and all the other papers in this action by adding and inserting the name of Eben D. Jordon, Jr., as a party defendant in this action coming on to be heard, after reading and filing the affidavit of A. Blumenstiel, verified the 27th of November, 1885, and the notice of motion and hearing—Blumenstiel & Hitsch, of counsel for plaintiffs, in support of said motion, and Messrs. Stern & Myers, attorneys for defendants, not opposing, it is—

Ordered that said motion be, and the same is hereby, in all respects granted, and the summons, complaint, and all other papers and proceedings herein are hereby amended by adding and inserting the name of Eben D. Jordon, Jr., as a party defendant in
21 this motion, and that such amendment be without prejudice to the proceedings already had, and that the action proceed in like manner as though said Eben D. Jordon had been originally made a party defendant.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court. A. Henry Schutz *et al. vs.* Eben D. Jordon *et al.* Order. Blumenstiel & Hirsch, attorneys for pl'ffs, 320 Broadway, N. Y. city. U. S. circuit court. Filed Dec. 5, 1885. Timothy Griffith, clerk.

22 New York Supreme Court, City and County of New York.

A. HENRY SCHUTZ, JULIAN SCHUTZ AND HENRY BLATH, Plaintiffs,
against
EBEN D. JORDON, CHARLES MARSH AND JAMES C. JORDON (sued as J. C. JORDON), Defendants.

The defendants, by Stern & Myers, their attorneys, answering the complaint herein—

I. Deny each and every allegation in said complaint contained.

II. For a separate and distinct defense, aver that the contract alleged in the complaint herein to have been made, if any such was made, was made by the plaintiffs with the said defendants, together with one Eben D. Jordan, Jr.; that at the times mentioned in the complaint and at all times since these defendants, with the said Eben D. Jordan, Jr., were copartners doing business under the firm name and style of Jordan, Marsh & Company; that the said Eben D. Jordan, Jr., is now living and is a necessary party defendant to this section.

III. And for a further separate and distinct defense the de-
23 fendants allege that at all the times mentioned in the complaint and for many years prior thereto they, the defendants, had been engaged in business in the city of Boston, Massachusetts, as copartners under the firm name and style of Jordan, Marsh & Company, carrying on, both at wholesale and retail, a very extensive business as dealers in many kinds of goods, wares, and merchandise, including among others, goods, wares, and merchandise of the general kind and description referred to in the complaint herein, and for that purpose employed many hundreds of assistants in and about their said business in Boston at very great expense to the defendants.

And upon information and belief the defendants allege that heretofore, and at some time or times prior to the dates mentioned in the complaint herein, the plaintiffs, without the knowledge of these defendants, entered into a corrupt and fraudulent agreement with one John H. Hewes, then a servant of the defendants and then and at all said times employed by the defendants in and about one department of their said business, which corrupt agreement and contrivance it was at said times agreed between the said plaintiffs and the said Hewes should be kept entirely concealed from and unknown to the defendants and each and all of them, and by which corrupt agreement it was, among other things, understood between the plaintiffs and said Hewes that the said plaintiffs should ship and deliver to the said Hewes at Boston, but in the name of the defendants' said firm, sundry goods, wares, and merchandise, which were to be received by the said Hewes at the premises oc-
24 cupied by the defendants for their said business in said city of Boston, and which goods, wares and merchandise were to be by said Hewes secretly and faudulently intermingled with the goods, wares, and merchandise then belonging to these defendants and then employed by them in their said business, and that by means of some trick or device of the plaintiffs or said Hewes, or both, the plaintiffs should, without the knowledge, authority, or consent of the defendants, acquire and come into the possession of certain moneys of the defendants by way of reimbursement and reward to the plaintiffs for such merchandise thus to be shipped to said Hewes.

That, in pursuance and in execution of said corrupt and fraudulent understanding between the plaintiffs and said Hewes, the plaintiffs thereafter and at divers and sundry times did ship and deliver

to the said Hewes certain goods, wares, and merchandise in the form, manner, and with the intent aforesaid, and the same were by said Hewes, and in pursuance of said fraudulent agreement between him and the plaintiffs, received at defendants' said premises, and were there fraudulently intermingled with the goods, wares, and merchandise of the defendants without the knowledge of the defendants or either of them, and in the manner and with the intent aforesaid, but these defendants are wholly unable to state definitely the dates of such shipments or receipts of goods or the amounts or values thereof or the quantity, kind, or description of the goods thus shipped and received.

25 And these defendants further allege, on information and belief, that the said fraudulent agreement between plaintiffs and said Hewes, as well also the said shipment of goods, wares, and merchandise in pursuance of such fraudulent agreement and the receipt thereof by the said Hewes as aforesaid and the intermingling of the same with the goods, wares, and merchandise of these defendants by the said Hewes as aforesaid, as well also each and every other thing done by the said Hewes or by said plaintiffs or both in pursuance or execution of the fraudulent agreement between them as aforesaid, were each and all by the said plaintiffs and the said Hewes fraudulently kept concealed from and unknown to these defendants and each of them until long after said Hewes had disposed of nearly all the goods, wares, and merchandise thus shipped to him.

And the defendants further allege, on information and belief, that it was a part of said understanding and conspiracy between the said Hewes and the said plaintiffs that the said Hewes should for the benefit of the said plaintiffs and himself use and employ the business prestige, capital, credit, and reputation of the defendants, as well also the premises occupied by and paid for by the defendants and the various clerks employed by the defendants in connection with their said business of Jordan, Marsh & Company, to dispose of the goods, wares, and merchandise that were to be shipped and delivered to the said Hewes in manner aforesaid by the said plaintiffs, and this wholly without the knowledge or consent or authority of the defendants or either of them, and such corrupt

26 agreement was accordingly carried out by the said Hewes and said plaintiffs in so far as said Hewes succeeded in disposing of the goods thus shipped to him.

And the defendants further allege, on information and belief, that it was a part of the said fraudulent agreement and conspiracy that neither of said plaintiffs nor the said Hewes should in any manner permit the said defendants to know or learn of the fraudulent agreement aforesaid or of anything that might be done thereunder, but that the same should be studiously kept from the knowledge of the defendants and each of them.

And the said defendants further allege, on information and belief, that in pursuance of such understanding the said Hewes and said plaintiffs did keep the said defendants from learning of any of the matters or things aforesaid until long after the receipt and disposi-

tion by said Hewes of almost all the merchandise that was thus shipped to him by the plaintiffs in pursuance of said conspiracy, and accordingly the defendants never did learn from any source of any of the matters aforesaid until long after said Hewes had thus received from the defendants and had disposed of nearly all of the goods, wares, and merchandise which had been shipped to him as aforesaid by the plaintiffs in pursuance of said conspiracy.

And these defendants further allege that none of the goods mentioned or referred to in the complaint were delivered to them, the defendants, except only as some thereof may have been de-
27 livered to the said Hewes at the defendants' said place of business in Boston and by him fraudulently intermingled as aforesaid with the goods, wares, and merchandise of the defendants in pursuance of the conspiracy aforesaid, and that it is the said fraudulent agreement between said plaintiffs and said Hewes and the said shipments of goods to and receipt of the same by said Hewes as aforesaid that constitute the supposed sale and delivery of goods, wares, and merchandise mentioned and referred to in the complaint herewith.

Wherefore the defendants pray judgment dismissing the complaint with costs.

STERN & MYERS,
Defendants' Attorneys.

Office and P. O. address, 40 Wall street, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

Simon H. Stern, being duly sworn, says that he is a member of the firm of Stern & Myers and one of the attorneys for the defendants herein; that he has read the foregoing answer, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That this verification is made by deponent because neither of said defendants is within said city and county of New York, where their said attorneys reside and have their office; that the grounds
28 of deponent's belief as to all matters in the foregoing answer not stated upon his knowledge are statements made to deponent by the said defendants, their servants and employés.

SIMON H. STERN.

Sworn to before me this 25th day of November, 1885.

H. A. KINGSBURY,
Notary Public, N. Y. Co.

(Endorsed:) N. Y. supreme court. A. Henry Schutz *et al. vs.* Eben D. Jordan *et al.* Answer. Stern & Myers, attorneys for defendants, 40 Wall street, New York. Due service of a copy of within admitted. New York, Nov. 25th, 1885. Blumenstiel & Hirsch, att'ys for pl'ffs. U. S. circuit court. Filed Feb. 1, 1886. Timothy Griffith, clerk.

29 Circuit Court of the United States for the Southern District of New York.

A. HENRY SCHURZ & O'rs, Plaintiffs,
vs.
EBEN D. JORDAN & O'rs, Defendants.

You will please to take notice that we are retained by and appear for each and all the defendants in the above-entitled action, and you are hereby required to so enter our appearance in this court, the above-entitled action having been removed to this court from the supreme court of the State of New York.

New York, Feb'y 2nd, 1886.

STERN & MYERS,
Def'ts' Att'ys, 40 Wall St., New York City.

To the clerk of the above-named court.

(Endorsed:) U. S. circuit court for the southern dist. of New York. Schurtz & o'rs *vs.* Jordan & o'rs. Appearance. Stern & Myers, def'ts' att'ys, 40 Wall St., N. Y. city. U. S. circuit court. Filed Feb. 2, 1886. Timothy Griffith, clerk.

30 N. Y. Supreme Court.

Trial — city & county of New York.

A. HENRY SCHUTZ, JULIUS SCHUTZ, & HENRY BLATH
against
EBEN D. JORDAN, CHARLES MARSH, J. C. JORDAN. } Summons.

To the above-named defendants & to each of them:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, Sept. 22nd, 1885.

BLUMENSTIEL & HIRSCH,
Plaintiffs' Attorneys.

Office and post-office address, No. 320 Broadway, New York city.

31 [Endorsed:] N. Y. — court. —— —— against —— —— Summons. Blumenstiel & Hirsch, plaintiffs' attorneys, 320 Broadway, N. Y. city.

32 N. Y. Supreme Court, City & County of New York.

A. HENRY SCHUTZ, JULIUS SCHUTZ, & HENRY BLATH
against
EBEN D. JORDAN, CHAS. MARSH, & J. C. JORDAN. } Complaint.

The plaintiffs, for their cause of action, by Blumenstiel & Hirsch, their attorneys, respectfully show:

At divers times on and between May 7th, 1884, & July 30th, 1885, the plaintiffs, at the special instance and request of the defendants and at prices agreed upon, sold and delivered to the defendants certain goods, wares, and merchandise, amounting in the aggregate at such agreed prices to the sum of thirty-two thousand six hundred & four $\frac{99}{100}$ dollars.

That the defendants have not paid the same nor any part thereof, though due and payable.

Wherefore plaintiffs demand judgment against the defendants for the sum of thirty-two thousand six hundred & four $\frac{99}{100}$ dollars, with interest on the items thereof from the date when they respectively came due, besides the costs of this action.

BLUMENSTIEL & HIRSCH,
Plaintiffs' Attorneys, 320 *Broadway, New York.*

33 CITY AND COUNTY OF NEW YORK, *ss:*

A. H. Schutz, plaintiff above named, being duly sworn, says that he has read and knows the contents of the foregoing complaint; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A. H. SCHUTZ.

Sworn to before me this 22d day of Sept., 1886.
HENRY V. ROTHSCHILD,
Com. of Deeds, New York.

(Endorsed:) N. Y. supreme court. A. Henry Schutz *et al.* against Eben D. Jordan *et al.* Summons and complaint. Blumenstiel & Hirsch, plaintiffs' attorneys, No. 320 Broadway, New York city.

34 At a special term of the circuit court of the United States held in and for the southern district of New York, in the second circuit, in the court-house, city of New York, the 4th day of December, 1885.

Present: Hon. Wm. J. Wallace, judge.

A. HENRY SCHUTZ *et al.*
vs.
EBEN D. JORDAN *et al.*

The motion for leave to amend the summons and complaint and all the other papers in this action by adding and inserting the name

of Eben D. Jordan, Jr., as a party defendant in this action, coming on to be heard, after reading and filing the affidavit of A. Blumenstiel verified the 27th of November, 1885, and the notice of motion and hearing, Blumenstiel & Hirsch, of counsel for plaintiffs, in support of said motion and Messrs. Stern & Meyers, attorneys for defendants, not opposing, it is ordered that said motion be, and the same is hereby, in all respects granted, and the summons, complaint, and all other papers and proceedings herein are hereby amended by adding and inserting the name of Eben D. Jor-
35 dan, Jr., as a party defendant in this action, and that such amendment be without prejudice to the proceedings already had, and that the action proceed in like manner as though said Eben D. Jordan had been originally made a party defendant.

A copy.

(Signed) TIMOTHY GRIFFITH, *Clerk.*

(Endorsed:) N. Y. supreme court. A. Henry Schutz *et al. vs.* Eben D. Jordan *et al.* Pleadings. Blumenstiel & Hirsch, attorneys for plaintiffs, 320 Broadway, N. Y. city. U. S. circuit court. Filed March 3, 1886. Timothy Griffith, clerk.

36 Circuit Court of the United States of America.

A. HENRY SCHUTZ & O'rs
against
EBEN D. JORDAN & O'rs. } Notice of Trial.

Please to take notice that the above cause will be brought to trial and a motion made to dismiss the complaint at the next circuit court of the United States of America for the southern district of New York, to be held in the said city of New York, at the U. S. court & post-office building in the said city, in the said southern district of New York, before the judge of the same court, on the 1st Monday of April next at 11 o'clock in the forenoon of that day.

Dated the 20th day of March, 1886.

Yours, &c., STERN & MYERS,
Att'ys for Def'ts.

To Blumenstiel & Hirsch, Esqs., att'ys for pl'ffs.

(Endorsed:) United States circuit court. Schutz & o'rs ag'st Jordan & o'rs. Notice of trial for April, 1886. Stern & Myers, def'ts' attorneys. Service of a notice of which the within is a copy is hereby admitted. Dated New York, Mar. 22nd, 1886. Blumenstiel & Hirsch, pl'ffs' attorneys. U. S. circuit court. Filed Mar. 22, 1886. Timothy Griffith, clerk.

37 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the seventh day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable Hoyt H. Wheeler, judge.

A. HENRY SCHUTZ *et al.*
vs.
EBEN D. JORDAN *et al.*

Now come the plaintiffs, by Blumenstiel & Hirsch, their attorneys, and move the trial of this cause. Likewise come the defendants, by Stern & Myers, their attorneys. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on Monday, June 20th, 1887, the jury retire and on their return render a verdict whereby they find for the plaintiffs in the amount of one hundred and seventeen dollars and seventy-seven cents ($117.77) on the bill of July 30, 1885, and a verdict for the defendants as to the residue of the plaintiffs' claim. It is—

Ordered, That the plaintiffs have a stay of all proceedings on said verdict for sixty days and pending the motion for a new trial.

TIMOTHY GRIFFITH, *Clerk.*

38 Circuit Court of the United States, Southern District of New York.

A. HENRY SCHUTZ *et al.*
vs
EBEN D. JORDAN *et al.*

This cause having been duly moved into this court from the supreme court of the State of New York for the city and county of New York, and the issues therein having been duly brought on for trial and tried before the Honorable Hoyt H. Wheeler, judge, and a jury, at the April term of this court, 1887, at the court-rooms thereof, in the city of New York, on the 7th, 8th, 9th, 10th, 13th, 14th, 15th, 16th, 17th, and 20th days of June, 1887, and a verdict for the plaintiffs having been rendered for the sum of one hundred and seventeen dollars and seventy-seven cents (117.77), and the plaintiffs' costs having been duly taxed at the sum of one hundred ninety-three and $\frac{38}{100}$ dollars:

Now, on motion of Blumenstiel & Hirsch, attorneys for said plaintiffs, it is ordered that the said plaintiffs recover of the said defendants the sum of one hundred and seventeen dollars and
39 seventy-seven cents ($117.77), found by said jury, together with one hundred ninety-three and $\frac{38}{100}$ dollars ($193.38), costs as aforesaid, amounting in all to the sum of three hundred eleven and $\frac{15}{100}$ dollars ($311.15), with interest from the 20th day of June, 1887, and that they have execution therefor.

Judgment signed this 13th day of September, A. D. 1887.

TIMOTHY GRIFFITH, *Clerk.*

(Endorsed:) Circuit court of the United States for the southern district of New York. A. Henry Schutz *et al. vs.* Eben D. Jordan *et al.* Judgment-roll. Blumenstiel & Hirsch, pl'ffs' att'ys. U. S. circuit court. Filed Sept. 13, 1887. Timothy Griffith, clerk.

40 United States Circuit Court, Southern District of New York.

SCHUTZ BROS. & BLATH
vs.
JORDAN, MARSH & CO.
April Term, 1887.

WHEELER, *J.:*

This is an action for goods sold and delivered, consisting of cloaks and suits, to the amount of $32,604.99. On the trial the plaintiffs' evidence tended to show that they forwarded from their manufacturing establishment in New York to the defendants' mercantile house in Boston these goods to that amount at various times between May, 1884, and August, 1885, on orders received by their salesman from the superintendent of the retail cloak and suit department of the defendants, who had given like orders before; that they sent invoices of the goods directed to the defendants by mail at the several times when the goods were sent; that they sent statements of accounts of the goods to the defendants by mail at same times, and particularly in August and December, 1884, and that the goods had not been paid for.

The defendants' evidence tended to show that the course of business in their house was such that goods bought and delivered were
41 received by a person whose duty it was to keep a record of the packages and forward them to the department where they belonged; that correspondence was received by a clerk who sent invoices of goods bought where they would be received by the superintendent of the department for which they were bought, and all correspondence relating to goods bought to the buyer, and all statements of accounts for goods bought to a book-keeper, who paid them when found to be correct; that the superintendent, when the invoices were received by him, would pass them as correct, if found to be so, and mark them as correct, and the person who received the goods would do the like, when they would go to that book-keeper and be entered on the books and be paid for according to the invoices so passed and received; that the superintendent of this department was inclined to carry more goods than the firm desired and was directed to keep down the stock; that when the plaintiffs' salesman applied to him for orders he told him that he was already carrying more goods than the firm allowed, but that if he would not have any statements of accounts or dunning letters sent to the house the goods might be sent and the invoices might be sent by mail as usual, for they would come to him anyhow, and that he would pass the invoices as fast as he could; that the salesman said he would report this to the plaintiffs, and afterwards said that he had done so and they approved of this proposal; that all these goods were sent under that arrangement;
42 that the invoices when received by him were kept from the members of the firm and others who by the usual course of business would have known about them; that the statements of accounts sent by the plaintiffs in August and December, 1884, were for goods ordered by assistants of the superintendent and sent in the

usual course; that only one other statement was received by the book-keeper, who found that it was for goods which did not appear on the books, and sent it to the superintendent for explanation, who kept it and reminded the salesman of the plaintiffs that it should not have been sent, and nothing further was done about it; that the plaintiffs called upon the superintendent to pass the invoices from time to time, and complained that they were delayed and getting old, and he requested them to send him some invoices of the goods without date, which they did, and into some of which he put late dates and passed them as correct, and procured the person who received goods bought to pass by telling him they were all right, and sent them to the book-keeper to be paid, who paid them and sent remittance sheets showing that they were paid as bills of a late date, which the plaintiffs received, but applied the payments to the charges of the amounts at the earlier dates when the goods were sent; that the goods as they were received were placed, by direction of the superintendent, among the other goods of the department for sale, and were sold and the money received for them by
43 the defendants, except to the amount of from three to five thousand dollars at cost prices, before this arrangement, or the fact that any goods not coming in the usual manner and appearing on the books of the defendants was discovered; that goods from others to the amount, with these, of $252,000.00 were received into this department on similar arrangements with the superintendent and in like manner; that he marked down prices without entering them in a book kept for that purpose, and forced sales at the reduced prices, so that this management of the department resulted in great loss, but the goods received from the plaintiffs and sold brought as much on an average as they were charged at; that when the discovery was made all the goods remaining on hand which had come from the plaintiffs were laid out and examined by the superintendent and others to ascertain whether any of them were goods that had not been paid for; that it could not be determined whether they were or not, and they were put back into the stock for sale and were all sold or on hand there; that other goods sent by the plaintiffs after the discovery were refused and returned; that the defendant firm consisted at that time of four members; that their house was divided into fifty-two departments, and they had upwards of two thousand persons employed in conducting their business; that one of the firm, Marsh, and the person who had charge of receiving goods bought, had died before the trial.

44 The book-keeper who had charge of paying for goods testified to the course of business, as stated; the superintendent to the course of business and to the concealment of these transactions from the defendants and how it was done, and two of his assistants testified to the disposition of these goods in the stock of the department and to the marking down of goods and the results. The senior member of the firm testified that Marsh had charge of the wholesale department; that when there he and the other two members of the firm would go through this cloak and suit department perhaps once a week or every day, but did not examine the stock; that on every

Saturday they had a statement furnished to them of the amount of stock on hand in each department and of the amount at the corresponding time of the year before, and also every month a statement of the amount on hand then and at the corresponding time of the year before, and that they had no other knowledge on the subject; that the figures did not excite suspicion; that he was gone on a voyage round the world from the fore part of November, 1884, to about June 20th, 1885, and that he had no information at any time of the receipt of any of these goods or of the avails of them until after the discovery; that one of the other members of the firm was at the time of trial gone on a voyage round the world and had been gone six months, and that he defended this suit because in his opinion the payment of the claims would involve a loss in
45 that department. The testimony of the absent partner was not introduced and the other one did not testify, and none other of the persons employed in the defendants' establishment testified in the case on the trial. The plaintiffs' evidence in reply tended to show that they could have determined whether the goods that remained after the discovery were of those paid for or not, if they had been called upon for that purpose, and that they were not so called upon.

The plaintiffs requested the court to charge the jury in substance, among other things, that the burden of proof was on the defendants to establish the defence set up by them that the goods were sent upon this arrangement with the superintendent for concealment from them; that the jury would not be at liberty to find that the firm did not have knowledge of the goods sent during the absence of the senior partner, amounting to $23,386.66, upon his mere denial without testimony from the other defendants; that if they after the discovery assumed ownership of any of the goods such act would amount to a ratification sufficient to make them liable for all the goods, and especially for that part; and that the mailing of letters and other communications by the plaintiffs to them would be *prima facie* evidence that the letters and contents were received by them in the absence of proof from each that they were not received.
46 The court directed the jury to return a verdict for the plaintiffs for the amount of one invoice of the goods received and retained after the discovery, amounting, with interest, to $117.77, and further charged the jury, in substance, that if the superintendent ordered these goods in the usual course, acting for the defendants, or gave the salesman to understand that he did, the plaintiffs were entitled to recover for the whole; that if he did not so order them, but lent himself in his position in the defendants' establishment to the plaintiffs for the purpose of getting their goods into the establishment of the defendants among the defendants' goods, without the knowledge and against the will of the defendants, and the plaintiffs or their salesman took advantage of the faithlessness of the superintendent to get the goods of the plaintiffs into the establishment of the defendants as if they were sold, against what they understood to be the will of the defendants and without their knowledge, to be disposed of there as if bought, the arrangement, if carried out, would

not amount to a sale of the goods so as to make the defendants liable for them as for goods sold; that the fact that the superintendent deceived the defendants was not important unless the plaintiffs or their salesman concurred in the deceit and acted upon it; that if the goods were sent under the arrangement with the superintendent, which the defendants' evidence tended to show, still if these and other
47 goods sent by other persons under similar arrangements came in such large quantities that in view of all the circumstances the defendants must have known that goods were being received as if bought beyond what were reported and their books showed, and they did not inquire where the goods came from, when in the exercise of due diligence they ought to have inquired, or did inquire and find out where they came from and made no objections, but continued to let the goods come and be disposed of and received the avails of them, the defendants would be liable for them as for goods bought, but that they were not to be held liable on this ground for not making inquiries which the plaintiffs or their agents intended that they should not make and deceived them into omitting; that the fact that the senior partner was absent during a large portion of the time when the goods were being received was to be considered with all the other evidence as bearing upon the question whether the defendants must have known that more goods were being received than were reported; that in giving notice of protest of notes and such cases the fact that the notice was mailed to the person would be sufficient, but that when a party is to be affected with knowledge of what is in a letter the proof must go further and show that it is received; that the fact that the plaintiffs mailed letters containing invoices and statements of accounts to the defendants would bear upon what the conduct of the plaintiffs was and their good faith in
48 this transaction, would bear upon how they understood the matter and were acting in regard to it, but would not in law establish the fact that the defendants received the letters and their contents, and would not be proof of that fact; that the fact that the defendants retained the goods concerning which they could not determine whether they came from the plaintiffs or not would not make them liable for any of the goods, and that the burden of proof was upon the plaintiffs to establish by a fair balance of evidence that the goods were ordered by the superintendent by virtue of his authority in his usual course, or that the defendants knew or ought to have known that these goods were being received from the plaintiffs, and permitted them to be received as if bought and disposed of, and that if they failed to establish one or the other of these propositions the verdict should be for the defendants as to these goods.

The plaintiffs excepted to these rulings as to the burden of proof, as to the goods received during the absence of the senior partner of the defendants' firm, as to the effect of retaining the goods and proceeds after the discovery, and as to the presumption of proof from the mailing of letters, among other rulings. The jury returned a verdict for the defendants as to these goods, except those in the invoice, as to which a verdict for the plaintiffs was directed, and the

plaintiffs rely upon these exceptions on this motion for a new trial.

49 The plaintiffs' declaration or complaint consists of one count merely for goods sold and delivered. The defendants' plea or answer consists of the general issue or denial and a statement of the facts which their evidence tended to show. If the statements in the answer are to be taken as true until disproved, as it is understood they must be under this system of pleading, they do not in connection with those in the complaint make out a cause of action; neither did the proof of the facts which the defendants' evidence tended to show in connection with the proof merely that the goods were sent and received and disposed of without more make out a cause of action. Those facts together did not show a sale and delivery of the goods, but showed that the plaintiffs attempted to make use of the defendants' establishment for the purpose of getting their goods into it and disposed of there for money and the money to the amount of the price of the goods returned to them without the knowledge and against the will of the defendants. This would not show a sale and avoid it, but would show there was no sale. The plaintiffs had to show more if they could. They undertook to show an order from a duly authorized agent accepted by them. This made a case if they could maintain it. The defendants did not deny the authority, but did deny the giving of the order. The latter was as essential to the plaintiffs' case as the former. They admit that if the authority had been disputed the burden of establishing its existence would rest upon them. There is, however, no difference as to burden between that and the other essential fact.

50 The jury found that they had not sustained the burden in this respect and that no order was given. Under the rulings there was still left to them the chance to make out the sale if they could by showing that the defendants knowingly permitted the delivery of the goods as if bought to be continued, and kept and disposed of them as their own. This was not meeting an avoidance by the defendants of a sale of the goods to them, but was making out the sale itself. If the plaintiffs could not make out this part of their case and the other part failed, as it did, they had no case. A delivery of goods would not make a sale, and a delivery and acceptance would not unless the acceptance was as of goods sold. The plaintiffs had to make out such an acceptance in order to sustain their allegation of a sale as to this part of their case. The court put the burden upon them of making out a sale in one way or the other. From time to time during the trial the preponderance of evidence on the issues shifted from side to side, so that at those times it might have been said that the burden of proof was shifted accordingly; but when the evidence was all in the question upon the whole was whether the plaintiffs had produced the fair balance of evidence necessary to make out the case which they undertook to make out. This question was left to the jury as to each aspect of the plaintiffs' case. To have required less would have left the plaintiffs a chance to recover without proving a right to recover. The authorities cited

do not sustain and the plaintiffs' counsel would not probably
51 contend for such a result. Ascher *vs.* Bank, 7 Alb. Law Journal, 43; Caldwell *vs.* Steamboat Co., 47 N. Y., 290; People *vs.* Thatcher, 7 Lans, 286; 55 N. Y., 535; Dalrymple *vs.* Hillenbrand, 62 N. Y., 5; Cowing *vs.* Altman, 71 N. Y., 435; Nelson *vs.* Woodruff, 1 Black, 156; Gay *vs.* Parpart, 106 U. S., 679; 1 Sup. C't Rep., 456.

These considerations afford something of a guide for the disposition of the question made respecting the goods sent and received during the absence of the senior partner of the defendants. If it belonged to the defendants to show that the goods came and were there and disposed of without their knowledge, then there was no direct testimony that the two partners who did not testify did not during the time in question notice the goods and become affected with the duty to inquire into their source and how they came there. This consideration would, however, apply to the rest of the time as well as to that and to the deceased partner, Marsh, as well as to them, except that the testimony showed that he had charge of the wholesale department and impliedly not of this branch of the retail department; but, as it rested upon the plaintiffs, as has been seen, to prove by circumstances or otherwise knowledge, and not on the defendants to prove want of knowledge, but only to meet the plaintiffs' proof of knowledge, it was not necessary for them to prove want of knowledge at this part of the time by any particular persons or wit-
nesses. The only difference in circumstances between this
52 and other parts of the time was that during this time the senior partner who testified did not have opportunity for such observation of the amount of goods and situation as he had when there. This circumstance was laid before the jury with the rest, and appears to have had the importance given to it that belonged to it.

The ruling in respect to the effect of mailing letters as evidence of their receipt and knowledge of their contents is connected with this part of the case. The defendants insisted at the trial and insist now that if the goods were not ordered in the usual course but were sent under the arrangement which they claimed existed there was no sale to ratify, and that knowledge of the receipt of the goods would not make them liable as for goods sold, and they insist now that the submission of their liability to the jury in that aspect was wrong, and that if it was done upon any erroneous ruling in respect to evidence bearing upon it the plaintiffs had a chance to recover what they were not entitled to, and cannot complain that it was not made still more favorable. It is true that if the transaction was as the defendants claimed and as the jury must have found there was no sale growing out of that, as the case and the law applicable to it is now considered, but the case was not submitted to the jury as to this ground of liability upon any idea of a prior sale that might be good if ratified and would not be good of itself. If nothing had ever occurred between the parties or those acting for them before
the goods were sent and they were sent as if the plaintiffs
53 understood they were sold and received by the defendants and retained with knowledge that they were so sent, the sending

would be an offer of sale and the receiving an acceptance which would constitute a sale at a known price, if there was one, and at a reasonable price if there was no other. In this case the invoices and statements, if sent and received, gave the price. It appeared at the trial and appears now that the plaintiffs were entitled to have the case submitted to the jury upon this aspect of the law. If so, they were entitled to have it submitted upon correct views as to the effect of the evidence. The defendants claimed then and insist now that the ruling as to the effect of mailing letters was correct. It was important to the plaintiffs that it should be, for if the jury could find that the defendants received the statements of accounts and invoices that would go far towards finding knowledge that the goods were sent. The ruling was made upon the supposition that the only presumption arising from the fact of mailing was that officers and persons engaged in transmitting the mail would do their duty. As was said by Dewey J., in Bank *vs.* Crafts, 4 Allen, 447, "In reference to the duty devolving upon the holders of commercial paper to give notice to indorsers it has, for the purpose of facilitating the transmission of notices of that character, long been held that the putting a letter into the post office is not only good *prima facie* evidence but sufficient proof to establish the fact of giving notice. The receipt of such notice is not open to be controlled;
54 but we do not understand that in other cases where notice is required by the terms of the contract or force of a statute the putting of a letter into the post office is presumptive evidence of the fact of the receipt of such notice." It appears, however, from an examination of the authorities cited in behalf of the plaintiffs that there is a further presumption arising from the usual course of business as to getting or receiving letters from the mail by those to whom they are addressed. Austin *vs.* Hallad, 69 N. Y., 571; Huntley *vs.* Whittier, 105 Mass., 391; Rosenthal *vs.* Walker, 111 U. S., 185; 4 Sup. C't Rep., 382; Best Ev., sec. 403. If correct apprehension by the court of all principles of law involved is necessary to the correctness of a trial there probably was error in this ruling; but correct instructions applicable to the case as presented and that the court should not be wrong to the extent of misleading the jury are all that seem to be requisite. Schools *vs.* Risley, 10 Wall, 91; Evanston *vs.* Gunn, 99 U. S., 660. In Huntley *vs.* Whittier the defendant requested the court to instruct the jury that mailing the letter in question was not sufficient notice unless they were satisfied that the defendant received it. This request was complied with, but the court added that the mailing of the letter would be *prima facie* evidence that it reached its destination. This instruction was approved, and Mr. Justice Gray, then chief justice of the supreme court of Massachusetts, in delivering the opinion of the court, said that the presumption arising was "a mere inference of fact
55 founded on the probability that the officers of the Government will do their duty and the usual course of business." This statement of the foundation of the presumption is quoted with approval by Mr. Justice Woods in the opinion of the court in Rosenhal *vs.* Walker. The evidence in this case does not show that the

free-delivery system of the Post Office Department prevailed in Boston at that time; but perhaps judicial notice should be taken of the size of that city and of the fact that it was such that the law required free delivery there and of the existence of the delivery there. 1 Greenl., Ev., sec. 6; Rev. Stat. U. S., sec. 3865. If so, the letters would be delivered by the Government carriers at the place of business of the firm and not at the residence of the members of the firm; if not so, the presumption from the usual course of business, that the firm would get letters addressed to it, would be that it would get them at its place of business, and not that the members would get them at their residence. That place would be the destination of the letters in either event. If the question was whether the letters got there only the request of the plaintiffs would have been well founded and the ruling clearly erroneous and misleading; but the question was whether the letters and their contents got to the members of the firm who could control the superintendent and not whether they got to the establishment. The invoices were by the arrangement found to go to the superintendent, and by the undisputed evidence they did go to him.

56 The only question left upon the evidence to which the presumption could be applied was whether the statements of account which the plaintiffs' evidence tended to show were sent and the defendants' book-keeper testified were not received were received and went to the defendants in person. If they were received at the establishment the same course of business that would send them to the book-keeper would have sent them again to the superintendent for explanation, where the other one relating to goods not on the books was sent and where all letters relating to goods bought were to be sent. There was no dispute about the fact of this course of business. The presumption arising from it as an inference of fact, as defined by Chief Justice Gray, would not, as applied to the course of the mail in arriving at and being disposed of in this establishment, have carried the letters to the defendants in person, but away from them to the superintendent. The extent of the presumption must necessarily be controllable by the circumstances of the actual course of business when shown. In Groton *vs.* Lancaster, 16 Mass., 110, it was held that proof of sending a notice from the overseers of the poor of one town by mail directed to those of another town was not sufficient to show that it was received by the latter. The ruling contended for by the plaintiffs would have left the jury to find that the defendants themselves received the letters, not only beyond, but contrary to the presumption arising

57 from the course of business shown in this case, while the ruling made, so far as applicable, merely confined them to it. However erroneous the supposition of the court as to the law on the subject of this ruling may have been, no misdirection of the jury, which would mislead them in this case, is made to appear.

The question made upon the ruling as to the effect of what was done by the defendants with the goods found in their establishment that came from the plaintiffs relates to the liability of the defendants in this action for all the goods sought to be recovered for as

well as for any of those goods in particular. Goods had been bought of the plaintiffs in the usual course before any of those in question were sent, and, in August and December, 1884, the superintendent had passed bills and procured money to be sent to them in June, 1885, for some of those first sent under this arrangement, and those of the invoice of July 30th, 1885, had been lately received. All of these except the latter had been paid for. The proportion of all of them to the whole quantity that came from the plaintiffs is so small that it might fairly be presumed that at least a considerable portion of those left were of the goods in question. The defendants' evidence that they could not ascertain whether any of them were goods not paid for must therefore be taken to mean that they could not tell whether any particular cloaks or suits were not paid for of those that were then there.

58 Such of those as were there had not come there by any act of the defendants or of any one authorized to act for them in getting goods there in that manner. They had not been sold to the defendants, but had been got there among the goods of the defendants' establishment by the procurement of the plaintiffs, and were situated as if the plaintiffs had personally taken them there and left them without the knowledge of any one connected with that establishment. The plaintiffs had, according to the finding of the jury on the other parts of the case, in undertaking to impose the disposition of their goods upon the defendants, so mingled them with the goods of the defendants that the defendants could not tell which were the plaintiffs'. The defendants could not return to the plaintiffs what belonged to them without sending the whole, which would include their own. The defendants knew that the plaintiffs claimed that all were sold to the defendants; the plaintiffs knew that the defendants claimed that they had not bought those in question. That the defendants knew that the plaintiffs could select those not paid for does not appear. By the civil law if goods so mingled are retained by either owner the other is left to his action for his share, to be estimated. Just. Lib., 2, tit. 1, § 28; Bract. B'k, 2, c. 3. By the common law if the goods cannot in fact be distinguished and the intermingling was wilful, with intent to defraud, the whole goes to the one whose property was invaded, and

59 the other loses his right. 2 Bl. Com., 405; Bac. Abr. Trespass, E; Lord Ellenborough, Ch. J., in Mayor, etc., *v.* Wilson, 5 East., 2 at page 7; 2 Kent Com., 364; The Idaho, 93 U. S., 575. The question here, however, is not whether the plaintiffs lost their property in these goods by reason of their conduct, but whether the defendants became liable for these goods as for goods sold to them by reason of theirs. But if the plaintiffs lost their right of property in the goods the liability of the defendants to them would not be enhanced by anything which they did about the goods. The intermingling may not have been so wilful and fraudulent as to affect the right of property. Ryder *vs.* Hathaway, 21 Pick., 298; Pratt *vs.* Bryant, 20 Vt., 333. If not, the plaintiffs could maintain no action for its detention without a demand for theirs. Bond *vs.* Ward, 7 Mass., 127; Sawyer *vs.* Merrill, 6 Pick., 477; Shumway *vs.*

Rutter, 8 Pick., 443. The defendants owed to the plaintiffs no duty about the goods. The most they could do would be to request the plaintiffs to select their own and take them away. They did not know that the plaintiffs could do that, so far as shown, and the claim of the plaintiffs that the goods were sold and belonged to the defendants would naturally lead them to suppose that the request would be unavailing, if made. They are not estopped from denying a sale by any misleading of the plaintiffs by their course in this respect. At the time they were doing what they did about these goods they were doing nothing about the others which the plaintiff claimed to have sold, and were expressly repudiating to the plain-
60 tiffs any liability for them as for goods sold. There was no attempted sale to ratify, and the defendants had nothing to meet but the plaintiffs' claim that there was a sale, which has by the verdict been settled, for the purposes of this motion, to be unfounded. The defendants did not yield to that claim as in the case of the invoice of July 30th, 1885, and thereby make themselves liable, but repudiated it always and so far with success. The plaintiffs have not on this motion relied upon the sale of the goods and the receipt of the avails prior to the discovery as bearing upon the liability of the defendants for those goods as for goods sold and delivered. This is not alluded to for the purpose of showing that anything has been waived or omitted on the part of the plaintiffs, but for the purpose of showing that it was not overlooked by counsel or court. In considering this point it must be taken to be settled that those goods were sold and the money for them received by the defendants by the procurement of the plaintiffs and without knowledge of the defendants on their part that the goods of the plaintiffs were being sold or that money was being received for them. They and all acting for them in those transactions supposed that their own goods were being sold and that all money received was theirs. Their superintendent was acting in these transactions for the plaintiffs, and not for them. The money was in the defendants' hands as if the plaintiffs, as before supposed, had put their goods into the defendants' establishment among the goods without the
61 knowledge of any one connected with it, intending that they should be sold and the money received for them, and all had been so done. The plaintiffs may not have lost their right to the money, but it was not in the defendants' hands through any fault of theirs. They were under no obligation to do anything about it until called upon for it. An action could not be maintained for it until after a demand for it. 2 Green Ev., sec. 120; Bank *vs.* Bank, 40 Vt., 377; Saville *vs.* Welch, 58 Vt., 683; 5 Atl. Rep., 491. The only thing which the defendants could do with the money was to keep it or send it to the plaintiffs. As they were not bound to do the latter, the omission to do it could not justly be claimed to affect their liability. Every advantage from this fact was claimed for the plaintiffs on the trial, and the questions arising on these claims were disposed of according to these views.

The defendants knew when they retained these goods after the discovery and sold them or put them into their stock again for sale

that the plaintiffs claimed that they were sold, but they did not know how many of them the plaintiffs claimed they were still liable for nor at what price. These goods were situated differently in this respect from those sent accompanied by a statement of account for them. The plaintiffs could not claim that they became liable for these goods at any price or for any amount, for there was nothing to show any price nor any amount, nor that the defendants were
62 liable for what those not paid for were reasonably worth, for there was no evidence as to how many there were of those particular goods not paid for or what they were worth. In Pratt *vs.* Bryant, 20 Vt., 333, the plaintiff sought to recover the price of some wood which he supposed he had sold to the defendant and which he delivered, and it became mingled with other wood of the defendant so he could not separate it, and which the defendant had not bought, and told the plaintiff he could take away, but to be careful and not take any other of the defendant's wood; the plaintiff did not take away any because he could not tell which his was, and the defendant used the whole. The court held that he could not recover the price as for wood sold, but could only recover in trover or by waiving the tort in assumpsit for the money, if any had been received; and the judgment for the plaintiff for the price was reversed and judgment rendered for the defendant. That was a stronger case for the plaintiff than this, for there the plaintiff supposed he had sold the wood, while here on the finding of the jury the plaintiffs must have known there was no sale.

On the whole case as presented, understood, and considered with reference to these points made on this motion, it is not made to appear but that the plaintiffs had a fair chance before the jury to obtain a verdict if they could for these goods, as if sold and delivered; that they failed is only attributable to the weakness of their case
63 and the strength of the defendants' case on the questions involved in that aspect. Whether they have rights to be relieved by other remedies is not now in question.

Motion for new trial overruled, stay of proceedings vacated, and judgment on the verdict ordered.

Blumenstiel & Hirsch, for plaintiffs; Stern & Myers, for defendants.

(Endorsed:) Circuit court of the United States for the southern district of New York. Schutz & *al. vs.* Jordan, Marsh & Co. Decision. Wheeler, J. Aug. 17, 1887. U. S. circuit court. Filed Aug. 17, 1887. Timothy Griffith, clerk.

64 At a stated term of the circuit court of the United States held in and for the southern district of New York, at the court-rooms thereof, in the city of New York, in said district, on the 10th day of September, 1887.

Present: Hon. Hoyt H. Wheeler, judge.

A. HENRY SCHUTZ *et al.*, Plaintiffs,
against
EBEN D. JORDAN *et al.*, Defendants.

This action having come on for trial before Hon. Hoyt H. Wheeler, judge, and a jury at the April, 1887, term of this court, and having been tried, and the jury having rendered a verdict in favor of the plaintiffs and against the defendants for the sum of $117.77, and a verdict in favor of the defendants and against the plaintiffs upon the remainder of the plaintiffs' claim herein, and the plaintiffs having moved upon the minutes of the court and upon their exceptions taken upon such trial for a new trial of this action:

Now, after hearing Messrs. Blumenstiel & Hirsch, plaintiffs' attorneys, in support of such motion, and Messrs. Stern & Myers,
65 defendants' attorneys, in opposition thereto, due deliberation being had, it is ordered that the plaintiffs' said motion for a new trial be, and the same hereby is, overruled and denied; that the stay of defendants' proceedings be, and the same hereby is, vacated, and judgment is hereby ordered and directed upon the verdict herein.

HOYT H. WHEELER.

(Endorsed:) United States circuit court, southern district of New York. A. Henry Schutz *et al.* ag'st Eben D. Jordan *et al.* Order denying motion for new trial. H. H. M. Stern & Myers, attorneys for def'ts, 40 Wall street, New York. U.S. circuit court. Filed Sep. 10, 1887. Timothy Griffith, clerk.

66–68 U. S. Supreme Court.

A. HENRY SCHUTZ *et al.*
vs.
EBEN D. JORDAN *et al.*

It is hereby consented that the defendants have ten days' time from date in which to serve amendments to the bill of exceptions heretofore served, and the defendants hereby stipulated that the time to file the record under the writ of error in this case be extended until the fourth Monday in November, 1887.

Dated New York, October 10th, 1887.

STERN & MYERS,
Defendants' Att'ys.

(Endorsed:) Filed Oct. 10, 1887.

69 Supreme Court of the United States.

A. HENRY SCHUTZ *et al.*, Plaintiffs in Error,
vs.
EBEN J. JORDAN *et al.*, Defendants in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said Court, at the Capitol in Wash-

ington, come the said plaintiffs in error, by A. Blumenstiel, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendants in error against the said plaintiffs in error for all but a very small amount of plaintiffs' claim, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendants for the full amount claimed.

And the said plaintiffs pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceeds aforesaid may be reversed, annulled, and altogether held for nothing, and that (they) the said plaintiffs may be restored to all things which they have lost by occasion of said judgment, &c.—

70 First. Because of the error that the plaintiffs did not obtain judgment for the full amount claimed in the complaint.

Second. Because of the error in rejecting evidence offered by the plaintiffs and allowing evidence to be admitted, as appears by the various exceptions taken to such refusals and admissions of testimony in the case.

Third. Because the court refused to direct a verdict for the plaintiffs for the full amount upon motion of the plaintiffs.

Fourth. Because the court refused to allow the complaint to be amended by adding a count for money had and received to the same amount that is claimed in the complaint for goods sold and delivered.

Fourth. Because the court ruled that the plaintiffs were bound by the conversations had with their salesman, Mr. Robertson, even though it did not appear that the same were communicated to plaintiffs.

Fifth. Because the court ruled that the burden of proof was upon the plaintiffs to make out their case all the way through, and refused to rule that the burden of proof was upon the defendants to establish the fraud alleged by preponderance of evidence.

71 Sixth. Because the court refused to rule that the retention of the whole or any portion of the property claimed to have been sold by the plaintiffs to the defendants or the whole or any portion of its proceeds amounted to or was evidence of ratification of the contract of sale.

Seventh. Because the court refused to rule that if the defendants retained any portion of the property so claimed to have been sold and delivered, after knowledge of the circumstances under which the property was received, that they thereby ratified the acts of their agents in his purchases thereof and were liable to plaintiffs as for a sale and delivery.

Eighth. Because the court ruled that the mailing of the letters and invoices to the defendants was not *prima facie* evidence of the receipt thereof by the defendants and in that connection because the court ruled that the fact that the plaintiffs mailed such letters did not affect the defendants unless they received them.

72 Ninth. Because the court ruled that the defendants were not bound to return any of the property received from the plaintiffs unless a demand was made therefor by the plaintiffs.

Tenth. Because the court refused to direct a verdict for the amount of goods sold between the 5th of November, 1884, and the 20th of June, 1885.

Eleventh. Because of the errors arising in the charge itself, to which exceptions were duly taken, and which exceptions appear upon the record.

Twelfth. For errors appearing by the record in the refusal of the court to charge certain requests made by the plaintiffs, and to which refusals specific exceptions were taken.

Thirteenth. To the refusal of the court to charge that the plaintiffs had made out by their evidence a case of sale and delivery of goods, and, further, that the court refused to charge that the evidence was upon the defendants to show that there was a fraudulent collusion which would defeat the sale.

Fourteenth. Because of the ruling of the court throughout the case, appearing by the exceptions duly taken, that if there was the arrangement claimed to have been made under the testimony of Mr. Hewes with Mr. Robertson, that then there was no sale
73 of the goods, and that defendants were not liable for the purchases made from the plaintiffs through the agents of the defendants, Mr. Hewes.

Fifteenth. To such other errors which may appear in the case and to which exceptions were taken on behalf of the plaintiffs.

ALEX'R BLUMENSTIEL,
Sol'r for Pl'ff in Error.

(Endorsed:) U. S. Supreme Court. A. Henry Schutz *et al. vs.* Eben D. Jordan *et al.* Assignment of errors. Blumenstiel & Hirsch, attorneys for plaintiffs, 320 Broadway, N. Y. city. Received this day a copy of the within paper. Oct. 22, 1887. Stern & Myers, def'ts' sol'rs. U. S. circuit court. Filed Oct. 22, 1887. Timothy Griffith, clerk.

74 Circuit Court of the U. S. of America for the Southern District of New York, in the Second Circuit.

A. HENRY SCHUTZ, JULIUS SCHUTZ, & HENRY BLATH
vs.
EBEN D. JORDAN, JAMES C. JORDAN, & EBEN D. JORDAN, Jr., Defendants.

Bond for Damages and Costs.

Know all men by these presents that we, A. Henry Schutz, Julius Schutz, and Henry Blath, plaintiffs, composing the firm of Schutz Bros. & Blath, and Emanuel Hirshkind, residing in the city of New York, and Max Hirschkind, residing in the city of New York, are held and firmly bound unto the above-named Eben D.

Jordan, James C. Jordan, and Eben D. Jordan, Jr., in the
75 sum of two hundred and fifty dollars, to be paid to the said Eben D. Jordan, James C. Jordan, and Eben D. Jordan, Jr.; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 14th day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-named A. Henry Schutz, Julius Schutz, and Henry Blath have prosecuted to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

76 Now, therefore, the condition of this obligation is such that if the above-named A. Henry Schutz, Julius Schutz, and Henry Blath shall prosecute their writ of error to effect and answer all costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

A. HENRY SCHUTZ. [L. S.]
JULIUS SCHUTZ. [L. S.]
HENRY BLATH. [L. S.]
E. HIRSHKIND. [L. S.]
MAX HIRSHKIND. [L. S.]

Sealed and delivered and taken & acknowledged this 14th day of September, 1887, before me—

WILLIAM V. A. POE,
[L. S.] *Notary Public, New York County.*

UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

Emanuel Hirskind and Max Hirshkind, being duly sworn, each deposes and says for himself that he is worth the sum of five
77 hundred dollars over and above all his just debts and liabilities.

E. HIRSHKIND.
MAX HIRSHKIND.

Sworn to before me this 14th day of Sept., A. D. 1887, *before me.*

WILLIAM V. A. POE,
[L. S.] *Notary Public, New York County.*

(Endorsed:) U. S. circuit court, southern dist. of New York. A. Henry Schutz *et al. vs.* Eben D. Jordan *et al.* Undertaking on appeal. Writ of error. Blumenstiel & Hirsch, attorneys for pl'ffs & app'l'ts, 320 Broadway, N. Y. city. The within bond is hereby approved Sept. 15, 1887. E. Henry Lacombe, U. S. circuit court. Filed Sept. 15, 1887. Timothy Griffith, clerk.

78 UNITED STATES OF AMERICA, *ss:*

To Eben D. Jordan, James C. Jordan, & Eben D. Jordan, Jr., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourth Monday of October, eighteen hundred and eighty-seven, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein A. Henry Schutz, Julius Schutz, & Henry Blath are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 15th, 1887.

E. HENRY LACOMBE.

79 [Endorsed:] E. & A. A. 702. U. S. Supreme Court. A. Henry Schutz, Julius Schutz, & Henry Blath, plaintiffs in error, against Eben D. Jordan, James C. Jordan, & Eben D. Jordan, Jr., defendants in error. Citation. Receipt of a copy of the within is admitted Sept. 15, 1887. Stern & Myers, def'ts' att'ys. U. S. circuit court. Sep. 16, 1887. Timothy Griffith, clerk.

80 U. S. Supreme Court.

A. HENRY SCHUTZ *et al.*
v.
EBEN D. JORDAN *et al.*
} No. 1280.

It is hereby consented that the bill of exceptions herein be made part of and printed with the record heretofore transmitted with the same effect as though the said bill of exceptions had been sent with such record in the first instance.

May 3, 1888.

ALEX. BLUMENSTIEL,
Att'y for Pl'ffs.
NATHANIEL MYERS,
Att'y for Def'ts.

81 [Endorsed:] Supreme Court U. S. 1887, Oct'r term. No. 1280. A. Henry Schutz *et al.*, pl'ffs in error, *vs.* Eben D. Jordan & *al.* Stipulation to make bill of exceptions part of record. [Stamped:] Office Supreme Court U. S. Filed May 4, 1888. James H. McKenney, clerk.

82 United States Circuit Court, Southern District of New York.

A. HENRY SCHUTZ, JULIUS SCHUTZ, and HENRY BLATH
vs.
EBEN D. JORDAN, EBEN D. JORDAN, Jr., CHARLES MARSH, and JAMES C. JORDAN.

Bill of Exceptions.

This action was commenced in the supreme court of the State of New York to recover the sum of $32,604.99 against the above-named defendants, residing and carrying on business in the city of Boston, State of Massachusetts.

The action was commenced on the 25th of September, 1885, and defendants appeared in the action by Wilson & Wallace, their attorneys, on the 14th day of October, 1885. On the 18th day of November, 1886, Mess. Stern & Myers were substituted by order duly made as attorneys for the defendants in place of Wilson & Wallace, and an answer was interposed to the complaint on the part of the defendants on the 25th of November, 1885.

A bill of particulars upon the demand of the defendants was duly served by the plaintiffs on the attorneys for the defendants, a copy of which is as follows, and which bill of items comprises the claim sued for in this action and was referred to in the examination of witnesses on the trial of this action:

83 *Bill of Items.*

Mess. Jordan, Marsh & Co., Boston, Mass., to Schutz Bros. & Blath, Dr., 356 Broadway.

1884.						
May	7.	To mdse.,	June 6th	10	147 00	
	8.			7	54 50	
	13.			12	37 50	
	21.		Aug.	15	181 88	
	24.			"	90 00	
	29.			"	90 00	
	"			"	52 50	
	31.			"	157 50	
						810 88
Sept.	6.		Oct.	6	220 50	
	15.			15	44 00	
	19.			19	138 50	
	26.			26	107 50	
	27.			27	107 50	
	29.		Nov.	1	7 50	
	30.			"	82 50	
						708 00

1884.						
Oct.	1.		"	129 00		
Sept.	26.	Oct.	26	21 50		
Oct.	2.	Nov.	1	85 50		
	3.		2	512 00		
	"		3	186 50		
	4.		" 10	955 20		
	7.		6 10	343 00		
84	8.		7	261 00		
	9.		8	204 50		
Oct.	10.	Nov.	9	125 50		
	11.		10	101 00		
	14.		13	354 50		
	"		"	78 00		
	16.		16	230 50		
	17.		"	118 75		
	18.		17 10	1,500 00		
	"		" 10	221 50		
	20.		19	136 00		
	21.		20	142 50		
	"		"	114 50		
	23.		22	157 50		
	"		"	125 50		
	25.		24	125 50		
	31.		30	1,302 50		
						7,519 95
Nov.	3.	Dec.	3	118 75		
	21.		21	1,265 00		
	22.		22	22 50		
						1,406 25
Dec.	1.		31	202 50		
	3.	Jan.	2	270 00		
	4.		3	315 00		
	6.		6	225 00		
	8.		7	225 00		
	10.		9	270 00		
	13.		12	157 50		
						1,665 00
85						
1885.						
Jan.	14.		10	11 50		
	"			16 50		
						33 00
Feb.	4.	Mar.	6	1,113 00		
Feb.	7.	Mar.	9	220 50		
	21.		23	483 50		
	25.		27	453 50		
	27.		29	394 00		
	28.		30	332 50		
						2,997 00

1885.						
Mar.	2.	Ap'l	1		24 00	
	"		"		287 00	
	5.		4		364 50	
	7.		6		259 50	
	10.		9		384 75	
Feb.	27.	Mar.	28		40 00	
Mar.	11.	Ap'l	10		80 00	
	12.		11		274 55	
	13.		12		42 50	
	14.		13		337 25	
	19.		18		343 25	
	21.		20		219 75	
	"		"		196 50	
	24.		23		158 75	
	"		"		290 50	
	26.		25		262 50	
	28.		27		99 00	
	"		"		261 00	
	30.		29		121 00	
	"		"		77 50	
	31.		30		116 00	
						5,167 50
86						
Ap'l	2.	May	2		43 50	
	"		"		105 00	
	3.	May	3		173 00	
	4.		4		87 00	
	"		"		112 00	
	7.		7		130 50	
	8.		8		143 50	
	9.		9		116 00	
	"		"		77 00	
	11.		11		58 00	
	"		"		59 50	
	"		"		58 00	
	13.		13		52 50	
	14.		14		125 00	
	15.		15		132 00	
	"		"		130 50	
	16.		16		17 50	
	"		"		37 50	
	18.		18		105 00	
	20.		20		1,065 50	
	22.		22		325 00	
	23.		23		450 00	
	24.		24		185 00	
	"		"		57 50	
	25.		25		170 50	
	28.		28		223 50	

1885.						
Ap'l	28.		28	156 00		
	29.		29	747 50		
	30.		30	137 50		
						5,499 00
87						
May	1.		31	171 75		
	"		"	97 50		
	4.	June	3	252 75		
	"		"	182 00		
	5.		4	258 25		
	6.		5	214 50		
	7.		6	165 00		
	8.		7	175 50		
	9.		8	195 00		
	"		"	150 50		
	12.		"	91 00		
	13.			53 66		
	14.		13 10	254 50		
	15.		14	8 75		
	"		"	131 25		
	18.		17	183 75		
	"		"	13 00		
	19.		18	201 25		
	20.		19	535 00		
	21.		20	280 00		
	22.		21	402 50		
	23.		22	183 75		
						4,191 16
June	2.	July	2	218 25		
	3.		3	1,177 25		
	4.		4	697 50		
	9.		8	108 00		
	11.		10	162 00		
	12.		12	135 00		
July	30.	Aug.	29	108 00		
						2,607 25
						32,604 99

88 On the 27th day of November, 1885, upon a petition duly made, this cause was removed to the United States circuit court for the southern district of New York, second circuit, and on the 14th day of December, 1885, upon an order duly made by the circuit court, Eben D. Jordan, Jr., was added a party defendant to the action, without prejudice to the proceedings already had, and the answer already served stood as the answer of all the defendants in the action.

On the 7th day of June, 1887, the trial of this action commenced before the Hon. Hoyt H. Wheeler, judge, and a jury, in the court-

house in the city of New York, and said trial was continued from day to day until the 20th day of June, 1887, when the jury rendered a verdict for the plaintiffs for the last item in the bill of particulars, which, inclusive of interest, amounted to $117.77, and a verdict also rendered for the defendants against the plaintiffs as to the rest of the claim sued for in this action.

Thereupon a motion for a new trial was made to set aside the verdict because it was against the law and the evidence and against the weight of the evidence, and also upon the exceptions taken in the case; which motion, having been taken under advisement by the court, was decided adversely to the plaintiffs on the 17th of August, 1887, and a written opinion filed by the justice upon such denial.

The following proceedings took place upon the trial and contain the exceptions presented by the plaintiffs:

89 JAMES M. ROBINSON was called as a witness for the plaintiffs and duly sworn, and upon his direct examination testified that he was a salesman for the plaintiffs; that he sold the goods mentioned and referred to in the complaint to the defendants, through John Hewes; that the prices were stated and agreed upon and John Hewes was the buyer for the defendants, and that the said John Hewes was the general buyer of the cloak and suit department, and had general authority to make all purchases for that department; that at the time of the purchases the witness made written memoranda of the orders received for goods, which memoranda of orders were produced in evidence.

The witness further testified that he saw in defendants' premises some of the goods which he had sold them; that they were in stock, and that no complaint at any time had been made that any of the goods claimed in the complaint had not been received by the defendants. A printed catalogue issued by the defendants of the goods for sale by them was produced and the witness recognized among the engravings in that catalogue representations of some of the goods so sold, and in respect to such goods the prices at which they were offered for sale by the defendants were in excess of the cost of the goods to them.

The witness testified also that at the time of the commencement of the dealings with the defendants he received direct orders to have all goods shipped to them by the N. Y. & Boston Despatch Co. He received the instructions from Mr. Hewes, which fact was communicated to the plaintiffs; and he further testified that, with the

90 exception of three or four cases, all the goods claimed in the complaint were so shipped. The three or four cases excepted as above were sent to them by the Adams Express Company on the 4th of February, 1885.

Q. Did you ever apply to Mr. Hewes for payment of any of these bills?

A. Yes, sir; I think along the latter part of 1884 and several times in 1885.

Q. What did you say to him and what did he say to you in connection with that?

A. The firm requested me to tell him that some bills were past due, and that we would like some money. I asked him if he would send the house some money—that some bills were due—and he made excuses and said he would pass some bills next week, and I asked where the bills were, and he said they were on file in the office. Then I kept asking him after that several times every time the firm would request me to do so.

The witness further said that Mr. Hewes was the only person with whom he had any dealings in selling the goods to Jordan, Marsh & Co., and knew him to be the general buyer of the cloak and suit department; that no dispute or complaint was made as to the prices or as to the non-delivery of any of the goods.

Upon cross-examination the witness testified:

Q. Have you told the jury all that occurs to you as being important in connection with this controversy?

A. All that I remember.

Q. There is no fact in your memory at all that you have not stated and which you consider of any importance in this inquiry?

A. I don't think of any now.

91 Q. Is there anything of an unusual character out of the common in respect to your transactions with Hewes about these sales?

A. Not that I remember; I don't remember anything.

Q. You would remember if there was anything of a very extraordinary nature, wouldn't you?

A. I might, but it is a long while ago.

Q. Your idea is that you had no understanding with Hewes in regard to these alleged sales whatever different from what you had in ordinary cases?

A. Not that I remember.

Q. Not that you remember?

A. No, sir.

Q. You sold goods to Jordan, Marsh & Co. through parties other than Hewes, didn't you, for Schutz Bros. & Blath?

A. No, sir.

Q. Did you ever sell any to Mr. Gardham?

A. I did, one bill; yes, sir, while Mr. Hewes was in Europe.

Q. Gardham then had charge of the cloak and suit department?

A. He was Mr. Hewes' assistant.

Q. At that time he had charge of that department while Mr. Hewes was in Europe?

A. Yes, sir; I suppose so; he bought goods.

Q. Was the transaction with Gardham of the same character as the transaction with Hewes?

A. What do you mean?

Q. I mean just what I say.

A. He picked out the goods and I sent the order in on the same terms.

Q. And there was no difference in the transactions that you can recall?

A. No, sir; not that I remember.

Q. Did you look to Gardham for the payment of that bill
92 or did you expect payment to come forward through some other source?

A. I did not look for any payment. I am only a salesman and I don't look out for that end of the business.

Q. Did you ever speak to Gardham about the payment of that bill?

A. I don't think I did.

Q. Was that bill paid for?

A. I don't know.

Q. Is that bill paid for?

A. I don't know.

Q. Did your connection with the matter cease when you received the order and transmitted it to your house?

A. Yes, sir; without I delivered some of the goods to them.

Q. Was your business ordinarily to collect?

A. No, sir.

Q. Was it your special business or was it your business in this case to collect from the house?

A. No, sir.

Q. Was Hewes the paying agent of Jordan, Marsh & Co.?

A. I don't know.

Q. Didn't you know that he was not? Didn't you know that he was simply the buying agent?

A. I knew he was the buyer.

Q. And don't you know that the paying was all done through an entirely distinct department of the house?

A. I know that there was not any paying done to our house.

Q. Don't you know that if you had done your business squarely as you had done it with Gardham the paying would have been done through another department?

A. I don't know anything about that business.

Q. But don't you know about your own business?

A. Yes.

93 Q. And don't you know that if you had made the arrangement with Hewes as you made it with Gardham that the money would have gone forward promptly upon maturity of the bill?

A. I made no different arrangements with Gardham than I did with Hewes.

Q. Do you know how it was that the Gardham bill was paid and the Hewes bill was not paid?

A. No, sir. I haven't anything to do with that end of the business. It is my business to sell the goods; I know nothing about the pay. If I am requested by the house to tell a man that some bills are due, then I do it; but it is not my business to collect the money. I couldn't collect it, but I just informed Hewes that the bills were past due.

Q. You say that in many cases when you sent orders to your house the orders were not wholly filled?

A. No, sir; they were not. The reason was that because in some instances Schutz Bros. & Blath did not have the quantity on hand called for by the orders. On account of my not participating in the filling of the orders I do not know to what extent they were filled or to what extent goods were shipped.

Q. Did you have anything to do with the making out of bills or invoices for Schutz Bros. & Co.?

A. No, sir.

Q. You know that some of the goods that you took orders for from Hewes were paid for, don't you?

A. I don't know anything about that part of the business.

Q. Haven't you been told so by the plaintiffs?

A. I don't remember.

Q. Haven't you discussed the matter with these plaintiffs, your employers, and haven't they told you that they received
94 pay for some of the goods?

A. I don't remember.

Q. Haven't you discussed the case with them?

A. I am only a salesman, and I am not one of the firm.

Q. Haven't you discussed the facts of this case with them before they put you on the stand?

A. I have heard it talked about for the last two years all over the country by everybody.

Q. Didn't they tell you that they had received some money from Jordan, Marsh & Co.?

A. I don't know as they told me so, but I think they have received some.

Q. Do you know whether the goods that you saw in that department there were goods that your firm received money for or other goods; can you distinguish?

A. No, sir.

The witness further testified that he did not personally participate in the packing of the goods or in the filling of the orders nor in making out the bills or invoices for the plaintiffs, but he knew he had received the orders mentioned in the bill of items for the reason that he had compared the bill of items with the orders in his own handwriting. The terms upon which the goods were sold were 7% off in 10 days, 6% off in 30 days, 5% off in 60 days, 3% off in 90 days, and 2% off in four months, and every bill was to be dated 30 days ahead. He knew of no arrangement for the deduction of interest in case payment was made prior to 30 days; that in case defendants did not take off any discount they were entitled to six months' credit net.

Q. You didn't see the bills or invoices that went forward?

A. No, sir; I did not.

Q. Did you ever furnish Hewes any blank-dated bills?

95 A. Yes, sir; I didn't furnish them—no, sir—but he wrote to me for some.

Q. For some blank-dated bills?

A. He wrote to me for some itemized copies of old bills. He wrote me a letter to tell me to do that, and I told the book-keeper.

Q. Where is that letter?

A. That is a year and a half ago, and I don't keep private letters as long as that.

Q. Did you destroy it?

A. I don't know where it is; I probably destroyed it, but I don't know.

Q. Did he write for some blank-dated bills?

A. He wanted me to ask the book-keeper to give him some itemized copies—that his bills were torn and soiled—and I told the book-keeper, and I suppose he sent them, but I don't know.

Q. Did he ask you for blank-dated bills—that is, bills without any date at the top of them?

A. I told you what he asked for.

Q. Did he ask for them—did he ask you to leave the dates out?

A. Yes, sir; that is, itemized copies.

Q. Did he ask you to leave the dates out?

A. That is what I said; he wanted some itemized copies without dates.

Q. What did you think he wanted with blank-dated invoices?

A. That I don't know.

Q. You had no idea and the letter didn't explain, did it?

A. I told you he said his bills were torn and soiled and he wanted some copies.

Q. Well, didn't he tell you why he wanted the dates left out?

A. No, sir.

Q. And you didn't know?

A. Not that I remember.

96 Q. You didn't know?

A. Well, I don't know what I thought then.

Q. That was a most extraordinary request, wasn't it?

A. Well, I don't know.

Q. Did you ever know any other merchant ever to make it of you—to request a blank-dated bill?

A. He didn't ask me; he wrote. I was in New York at the time.

Q. Did any other merchant, in all your dealings, ever write or ask you for a blank-dated bill?

A. I don't remember whether they did or not.

Q. Doesn't that stand out single and alone as the one instance in which a man wrote or asked you for an undated invoice?

A. I don't know what he wanted with them.

Q. Haven't you had that circumstance in your mind all the time since this litigation has been progressing, and didn't you have it in your mind when I first asked you whether you had told everything of importance that you knew of in this action?

A. No, sir.

Q. Do you mean to have the jury to understand that you had forgotten the fact that Hewes wrote you for undated invoices?

A. That I had forgotten? I hadn't forgotten it; no.

Q. You hadn't forgotten it?

A. Still I didn't think of it then, but when you reminded me of it I thought of it.

Q. Now, is there any other circumstance connected with your dealings with Hewes that you have hitherto not mentioned?

A. I don't remember any now.

Q. Did he tell you individually of what bills he wanted copies sent with dates blank?

A. I don't remember.

Q. Did he ask you for copies of all the bills that the
97 house had ever sent?

A. I know he asked for copies or duplicate bills. I don't know whether he stated the number or how many bills.

Q. Did he give you to understand that he wished all the invoices for eighteen months, and said that they were soiled or old, and that he wanted new copies of all your bills?

A. He didn't give me to understand that. I told you that he wrote to have copies sent him and I told the book-keeper.

Q. Do you remember when that was or about when it was?

A. I should say that was in the latter part of 1884 or in January, 1885; it was somewhere along there, but I don't remember exactly.

Q. And do you remember what was the amount in arrears at that time?

A. No, sir.

Q. Well, you know there was a very large amount in arrears, don't you?

A. I don't know anything about it. I didn't know how much he owed until this thing came out. I knew that I was selling him a good many goods, but not how many.

Q. Didn't you keep track of what you had sold?

A. No, sir; I did not.

Q. You didn't know that they were in arrears?

A. I told you I knew there were past-due bills, because I asked Hewes.

Q. I asked you a moment ago if you knew they were in arrears, and you said you had nothing to do with that.

A. I must know that they owed money when the firm said that bills were past due.

Q. At the time you got that request for these blank dated bills didn't you know he was in arrears?

A. I suppose that I did.

98 Q. Did the house tell you to dun him for money or to urge him to send money without giving you any idea as to how much he was in arrears?

A. Yes, sir.

Q. Did you know whether he owed five hundred dollars or ten thousand dollars?

A. Yes, sir; I knew there were some bills behind.

Q. Did you know it was over five thousand dollars?

A. I know nothing about the books. I was told there was money

due and was told to get a check sent through, because they wanted some money, and that is all I know about it.

Q. And these bills were overdue that you spoke of?

A. That is what the house said.

Q. How near could you come to it as the amount that was overdue?

A. I suppose in the neighborhood of $5,000, because, I think, the house told me to tell him to see if he couldn't send a check for $5,000.

Q. Did you ever speak to any member of the firm of Jordan, Marsh & Co. on any subject?

A. No, sir.

Q. Did you ever speak to their cashier on any subject?

A. I didn't know him.

Q. Did you ever speak with any of their employees except buyers in the different departments, that you know of?

A. I don't remember of any.

Q. Isn't it the truth that you did know that Hewes had nothing to do with the making of payments? Isn't that the truth, that you well knew that Hewes was simply buyer, just as you were the seller, and that Hewes had no more to do with the making of the payments for his house than you have with the making of payments for your house?

99 A. I know that every buyer has to pass bills before they can be paid.

Q. Did you think he had anything else to do with it than the passing of the bills?

A. No, sir.

Q. Why do they have to pass the bills before they can be paid?

A. To see if they are correct. They buy a cloak for $10, and if you send them one worth $5 the buyer would detect it.

Q. And until he passes the bill, as you call it—that is, O K's it—the house wouldn't pay it?

A. That is what I understand.

Q. That is what you understand as mercantile usage?

A. Yes, sir.

Q. Now, you probably have an understanding of when the buyer ought to pass the bill—when he ought to pass upon it one way or the other?

A. I couldn't tell you in a concern like that, where they get so many goods.

Q. By a concern like that you mean such a large concern?

A. Yes, sir.

Q. You know that Jordan, Marsh & Co. is one of the largest firms in the country?

A. Yes, sir.

Q. They buy millions upon millions of goods a year?

A. Yes.

Q. Their place of business is very spacious?

A. Yes.

Q. It comprehends, to your knowledge, does it not, some
100 forty or fifty departments, to your knowledge, from your frequent visits to the house?

A. Twenty or thirty, I should think. It is a large house.

Q. And that these different departments are presided over by different employees?

A. Different buyers?

Q. Buyers or managers.

A. Yes, sir.

Q. And until the buyer approves the bill it does not go into the books of the firm.

A. Well, it does in most houses.

Q. Then did you understand that these bills had to go into the books before they went to the buyer in the house of Jordan, Marsh & Co.?

A. I didn't know anything about it.

Q. If these bills or invoices had got into the books of Jordan, Marsh & Co. before Hewes received the bills, why should Hewes want copies of them because they had got soiled? Why, if they were on the books already, couldn't he get copies of them from their own books?

A. They didn't copy the items.

Q. Don't they in that house?

A. Not the items.

Q. You think the amounts were on their books but not the items?

A. I understand that the bill is numbered in red letter and then put on the invoice book, and then it goes to the buyer, and then that number has got to be accounted for before it can ever be paid.

Q. Did you understand from Hewes that he had a number of bills that were so soiled that he couldn't read them?

A. I don't know about that. He asked it of me as a favor
101 and I done it.

Q. To come right down to the marrow of this matter, isn't it the fact that you wanted to dispose of a great quantity of goods to Hewes? You did want to sell him goods, didn't you?

A. I tried to sell him all I could.

Q. You considered the house a very solvent house?

A. Yes, sir.

Q. And you said that you would sell them to-day, if you could?

A. Yes, sir.

Q. And you knew the house had the reputation of discounting its bills, did you not?

A. I didn't know anything about that part of the business.

Q. Didn't you know what its reputation was?

A. No, sir; I didn't know anything about that part of the business; I didn't know whether they paid in ten days or thirty days or four months.

A. Didn't you know that that was the general and universal reputation that that house enjoyed, of wanting the largest possible discount and paying with the greatest promptitude all that time?

A. I didn't know it.

Q. You hadn't heard of that reputation?

A. I hadn't heard of that.

Q. Now, being desirous of selling to Hewes, did he not tell you that the firm objected to his carrying in his department a large stock of goods?

A. I don't remember of any such thing.

Q. Didn't he mention to you particularly the name of James C. Jordan, one of the defendants, as a member of the firm who kept posted as far as he could from the books of the firm as to the
102 course of the stock in the different departments and the amount of the stock that was being carried in the different departments?

A. Not that I remember.

Q. And didn't he tell you that if he took the goods from you he would not dare to let the firm know?

A. No; I don't remember any such thing.

Q. You don't remember any such thing?

A. No; I don't.

Q. And were not the goods shipped to him which you took orders for from Hewes or ordered to be shipped to him by you through your house upon the understanding that Jordan, Marsh & Co. and the members of the firm should be kept in ignorance of the alleged transaction?

A. No, sir; no such instructions from me.

Q. But was not that the arrangement between you and Hewes?

A. No, sir.

Q. Wasn't there any talk to that effect?

A. I don't remember anything of the kind.

Q. And didn't you tell him that you would before doing that confer with your firm and see what they said about it—didn't you tell him that?

A. No, sir.

Q. Have you any memory on the subject?

A. I know I never told him that.

Q. And didn't you subsequently confer with Schutz Bros. & Blath?

A. Not that I remember.

Q. And didn't they tell you to go ahead and let Hewes have all the goods he would take?

A. No, sir.

Q. And didn't you return to Hewes in Boston and tell him that Schutz Bros. & Blath said "all right?"

A. No, sir; I have no recollection of anything of that kind.

103 Q. And didn't you ask him how in the world you would ever get any money or your firm could get any money from Jordan's folks for the bills which were kept suppressed? Didn't you ask him that?

A. Not that I remember.

Q. And didn't Hewes tell you that he would get the money for you if you would get him blank-dated invoices?

A. No, sir; I don't remember it; he wrote in a letter about the

blank-dated bills. I was in New York when I received it, and I showed it or read it to the book-keeper, and whether he sent them or not I don't know. This place of business of Jordan, Marsh & Co. covers an immense area of ground—an enormous building, fronting on two streets, I think. It is a large house of three or four stories; I don't know which. Then there is a cellar and sub-cellar, and goods kept all around in large quantities.

Q. And you have been all through the house?

A. Not through it; no, sir.

Q. And you know that there are a couple of thousand employees under that one roof?

A. I know there are a great many, but I don't know whether there is a thousand or two thousand.

Q. You don't mean that Mr. Jordan or Mr. Marsh or either member of the firm of Jordan, Marsh & Co. ever saw your goods in their house or in Hewes' department or knew distinctly that they were your goods, do you?

A. I don't know how they should——

Q. You don't know how they should be able to distinguish them; that was not their part of the business, was it?

A. No, sir.

Q. And you don't mean to say that they stood at the receiving door and saw your goods going into that establishment, do you?

104 A. No, sir; I don't think they did.

Q. And you never had any talk with any of them?

A. No, sir.

Q. You know that in the year 1883 you sold to Jordan, Marsh & Co. regularly, in the ordinary way, through Hewes, and that $3,500 worth of goods was the entire amount for that year?

A. I don't remember how much, but I know I sold him some goods.

Q. And don't you know they were promptly paid for within thirty days?

A. No, sir; I do not know it.

Q. And the discount taken off?

A. I do not know it.

Q. Well, there was no talk with you nor any letters to you about undated invoices, was there?

A. No, sir.

Q. And you didn't have to go to Hewes nor anybody else for money in the year 1883?

A. Not that I remember.

Q. And isn't it the fact that when these accounts remained unsettled for many months in the year 1885—from the 1st of January to the 1st of August—you caused to be shipped to Hewes over nineteen thousand dollars' worth of goods upon which you only received about four thousand dollars. Isn't that the fact?

A. I don't know what they received. I have told you I don't know anything about it. I only know the orders were taken by

me and I sent in the orders, and that I would have sold over $400,000 if they had bought it.

Q. Do you know that you made an arrangement with Hewes whereby in order to get money for Schutz Bros. & Blath with respect to the goods that were being shipped in a way Jordan, Marsh & Co. should be allowed to know nothing about it—in order to get money for these goods, you arranged with Hewes to have false invoices sent into them which he was to O K or "pass," and that checks would
105 thereupon be sent to your people by Jordan, Marsh & Co. for these false invoices, and that your people should acknowledge receipt of these checks in respect to the false invoices which did not appear upon the books of Schutz Bros. & Blath, and that they did receipt for those moneys without calling the attention of Jordan, Marsh & Co. to the fact that the invoices were fictitious? Didn't you make that arrangement?

A. No, sir; I did not. If such could be the fact I don't think I could explain it. It was my business to sell the goods and to send the orders in to the firm, and it is their business to collect. I have nothing whatever to do with it.

Q. Now, do you still say that you had no talk with Hewes on the subject of furnishing him goods in such a way that Jordan, Marsh & Co. should not be permitted to know anything about it?

A. No, sir; none that I remember.

Q. None that you remember?

A. No, sir.

Q. Is that all you will say on that subject?

A. That is all I know.

Q. Didn't you agree with Hewes that the firm of Schutz Bros. & Blath should not write any letters to Jordan, Marsh & Co. in regard to the goods which you were going to have shipped to him?

A. I don't remember any such thing.

Q. Didn't you agree with Hewes that the house of Schutz Bros. & Blath should not send to Jordan, Marsh & Co. any monthly statement?

A. On one occasion I remember it.

Q. What was that?

A. That was in 1884. There was a lot of suits, just two or three days before he was going to Europe, and he said he would fix them
106 up when he got back, and he said, "Don't send a statement in," and I wrote those instructions, and then when he got back from Europe he says, "Your folks did send a statment," and I said, "I told them not to," and he said, "They sent one, anyway." That is the only time I remember.

Q. Do you affirm that that is the only time you ever had any talk with him on the subject of your folks not sending a statement, or do you mean to swear that you don't remember?

A. I don't remember of any other time. I don't think there was any other talk.

Q. When it happened on that one occasion, and your instructions or request to the house was disregarded or violated, did you tell him it should never happen again?

A. Not that I remember.

Q. Do you know what the usual business custom is in regard to sending statements?

A. No, sir.

Q. Have you heard of such a thing as a statement?

A. Yes, sir.

Q. And you knew what it meant when Hewes told you he didn't want a statement sent?

A. I know a statement is a statement of account.

Q. Without embodying the items?

A. I suppose so.

Q. What do you say?

A. Yes.

Q. Don't you know that the sending a statement by your folks to Jordan, Marsh & Co. would have tended to disclose the dealings between you and Hewes?

A. No, sir; I don't know it.

Q. Then why did you suppose that he didn't want a statement sent, and why did you request your people not to send one in that one case?

A. Because Mr. Hewes asked me to do it.

Q. What did you understand would be accomplished by the not sending of such a statement?

A. I don't know.

107 Q. Was it the idea that Jordan, Marsh & Co. were not to know of that particular transaction?

A. I don't know what the idea was. I merely acted according to instructions.

Q. Was that your idea of the arrangement between you and Hewes on that occasion?

A. I don't remember what my idea was.

Q. How is it in your individual experience, is it or not common for a buyer to request you to do that?

A. No, sir; it is not a common thing.

Q. A very uncommon thing, isn't it?

A. I don't remember ever being asked that before; still it may have been.

Q. What did Hewes tell you when you asked him for money?

A. I told him that the house requested me to tell him that some bills were past due and that they would like some money.

Q. He told you he would pass them the next day or day after?

A. Yes, sir; and then we would sell more goods.

Q. And he told you, did he, that the past-due bills had been withheld from Jordan, Marsh & Co. and that he would then proceed to pass them?

A. No, sir.

Q. You told him that the bills were past due and that your folks wanted money?

A. Yes, sir.

Q. And he said he would pass the bills?

A. Yes, sir.

Q. Then you understood that they had not been passed up to that time?

A. That is what he told me; I did as I was told and I don't know whether he passed any or not; that is the conversation we had. I don't know whether he passed any bills or not. I spoke to him from three to four to half a dozen times, and each time he made about the same answer.

108 Q. And that was that he would pass the bills?

A. The next day or two or three days from that.

Q. Did you ever know of a buyer before taking six months to pass a bill?

A. I never had it done among other buyers. At the time these bills were overdue and I was sounding Hewes for money I still continued to ship him more goods.

Q. At the same time that these bills were overdue and you were dunning Hewes for money you still continued to ship him more goods straight on?

A. I sold him all the goods I could sell him and the house done the shipping.

Q. And they continued to ship, did they?

A. I believe they did. I would sell the goods until I was told to stop; that is what I am hired for. I never checked off the goods received with Hewes. The occasion when Hewes asked me to send new bills because the others were soiled was the only occasion that I remember. He asked for some itemized copies without dates. I don't remember whether he wanted 10 or 15, and I showed the letter to the book-keeper and I suppose he sent them. I don't know whether he has them in his hands now or not. He requested me to do that for him and I done it as a favor.

A remittance sheet dated August 7th, 1885, produced upon the request of the defendants' counsel by plaintiffs and read in evidence and marked "Exhibit A." Said remittance sheet is as follows:

109 BOSTON, MASS., *Aug. 7th*, 1885.

Mess. Schutz Bros. & Blath.

DEAR SIRS: Inclosed we hand our check in settlement of bills, as per memorandum below. Please acknowledge receipt, and oblige

Yours truly, JORDAN, MARSH & CO.

This is intended as a settlement in full for all our purchases of you up to the current month, and you will oblige us by rendering your receipt to that effect or notify us to the contrary at once.

July 22, 7–10. Aug. 21		1,171 50	(Bill July 22, in pencil.)
	7 dis.	81 93	
		1,088 57	
	Due Aug. 31.		
	Less int. at 6 %	4 36	
		1,084 21	

The portion in red ink is underlined.

I don't think I had any conversation with the plaintiffs with regard to that remittance sheet.

Redirect:

The amount of goods which I saw in defendants' store was about several thousand dollars. The house of Jordan, Marsh & Co. were doing a large business in cloaks and suits during the years 1884–'85, and Hewes was at that time the buyer for them. I think the trouble between the defendants and plaintiffs commenced about the first of August, and a similar trouble with other houses. Mr. Hewes, after that, remained in the employ of the plaintiffs two or three
110 months, I think. After the struggle arose I couldn't sell him any more. We had them to sell, but they would not buy.

JAMES KENNY, called for the plaintiffs and sworn, testified that he was an engraver on wood; that he recognized the catalogue and some of the engravings in it; that he did the work on that catalogue for Jordan, Marsh & Co., who paid him for it.

On cross-examination he testified that the order he received was a general order from the house, with a memorandum on the top "Jordan, Marsh & Co." The order came from A. B. Clark, who was in charge of the mail-order department, Jordan, Marsh & Co.

FRANK M. GREGORY, called for plaintiff, testified that he was in the employ of Mr. Kenny as an artist; that between January and March, 1885, he went to the plaintiff and made for Mr. Kenny some sketches of some suits, but that he did not know for what they were intended and was unable to identify or recognize them.

GEORGE DAWSON, a witness for plaintiff, testified that he was an errand boy in the employ of plaintiffs during the years 1884–'85; that he had charge of the mailing of letters; that he received all letters from Mott, the book-keeper of the plaintiffs, and he deposited all such letters during that period in the United States post office, postage prepaid.

Thereupon the depositions of Daniel Lovery, Mr. Taft, H. McLaughlin, and E. D. Winchester were read in evidence.

111 These witnesses were connected with the Boston Despatch Company and identified the Boston receipt books of said company containing identifying marks of all goods sent to the defendants during that period through the Boston Despatch Co., and also containing receipts for goods so marked by various of the defendants' clerks, and testified that all goods described in said receipt books and so receipted for were duly received at Boston and delivered at the store of the defendants.

LIZZIE J. BLAKSLEY, called for plaintiffs, testified that she had charge of the suit department; that she filled orders, packed them up, and delivered them to the shipping clerk; that she filled out the orders for the plaintiffs for suits sent to Jordan, Marsh & Co. and charged them in the books; that she examined these books and

compared them with the bill of particulars, and that all suits which were sent by the plaintiffs to Jordan, Marsh & Co. were all packed by her, charged in the book, and delivered to the shipping clerk of the plaintiffs.

She also identified from the catalogue models of some of the suits sold by the plaintiffs, and that she saw the designer when he came to sketch the suits and showed him which ones to sketch; but she said that a stranger taking that catalogue could not by an inspection tell whether those particular designs came from the plaintiffs' firm; that she knew them from her personal familiarity with the designs and because she had handled the goods, but that otherwise she couldn't tell herself from an inspection of the catalogue or the designs whether they were copies of Schutz Bros. & Blath's goods
112 or not; that there was nothing in the catalogue to indicate it.

She also testified that she made out a shipping ticket with each lot of goods, which shipping ticket was produced in court and was identified by her.

ALFRED C. HERTZ was next called and examined, and testified that he was the shipping clerk of the plaintiffs; that he packed all the goods that went to the defendants and delivered them to the express company and took receipt from the express company in each case of goods sent to Jordan, Marsh & Co.; that he directed them to Jordan, Marsh & Co. on the cases and gave the cases to the expressman; that he copied the shipping receipts into certain books in his own handwriting, which books and shipping receipts were produced; that he had compared these receipts with the bill of items in evidence, and that the shipping receipts produced in court called for all the goods covered by the bill of items.

The New York receipt books of the N. Y. & Boston Despatch Co. were also produced and identified by the witness as receipts for the goods sent to Jordan, Marsh & Co. by the plaintiffs, and that he knew the person who signed the receipts as being a person employed by the N. Y. & Boston Despatch Co.

That all of these shipping tickets and receipts of the Boston Despatch Company were offered in evidence and comprised several bundles.

He further testified that all the goods sold by the plaintiffs and claimed in the bill of particulars were sent through the Bos-
113 ton Despatch Co. excepting one item sold on the 4th of February, 1885, which was sent by the Adams Express Company, a receipt for which was also produced and identified by the witness.

On cross-examination the witness testified that on every occasion when receipts were given he delivered the goods to the driver at the door of the plaintiffs; that he had gone over each one of the receipts carefully and compared them with the bill of particulars.

A. JUDSON DUNLAP was sworn, and testified that he was the general agent of the N. Y. & Boston Despatch Co. and was during all the period referred to in the complaint, and that he has examined the receipts put in evidence by the court and signed by the driver

and identified the receipts as being the receipts of the duly authorized driver of the Boston Despatch Company for goods delivered to them; that he had had the books in his possession some time prior to the trial and had compared a number of them with his own books; that he remembered receipting goods directed to Jordan, Marsh & Co., and that they were forwarded to them, and that he never received any complaint from them of the non-receipt of the goods sent to them by the plaintiffs.

WILLIAM LIPPMAN called, and testified that he had charge of the cloaks sent by plaintiffs to defendants; that he received the orders for them, charged them in the books in his own handwriting, which were produced in court; that he selected them, packed them, made out the shipping tickets, turned the goods over with the shipping tickets to Mr. Hertz, the previous witness, and that all the cloaks went through his hands and were packed and shipped by him.

114 This was the case for the plaintiffs.

Counsel for defendants made a motion to dismiss, but, upon the court ruling that a *prima facie* case had been made out, counsel replied, "I don't know but what your honor is right;" whereupon counsel for the defense opened the case to the jury.

Defendants' Case.

LEWIS C. MOTT was called and sworn as a witness on the part of the defendants, and, examined by Mr. Myers, testified that he was the book-keeper and cashier of the plaintiffs and had been for the last six years; does not know Mr. John Hewes and never met him. He kept the books of the plaintiffs and the account of Jordan, Marsh & Co. with the plaintiffs in a ledger, which was produced in court; says the ledger contains records of all the supposed shipments made to Jordan, Marsh & Co., with the dates; that he received a remittance sheet from the defendants about the 1st of July, 1885, and another one about the 9th of July, 1885, which are produced by the plaintiffs. The one dated July 1st, 1885, was put in evidence, marked Defendants' Exhibit B, and is as follows:

BOSTON, *July 1st*, 1885.

Mess. Schutz Bros. & Blath.

DEAR SIRS: Inclosed we hand our check in settlement of bills as per memoranda below. Please acknowledge receipt and oblige,

115 Yours truly, JORDAN, MARSH & CO.

June 28th, 7-10	------	146 25	Ap'l	12	(lead-pencil mem.).
" " "	------	243 75		7	
" " "	------	334 50		29	
30	" ------	243 75		24	
28	" ------	114 00	May	1	
29	" ------	146 25	April	23	

June 29,	7–10	156 00		17	
30	"	68 25		4	
"	"	48 75	Mar.	29	
		1,001 50			
Dis.		105 10			
		1,396 40			

He says that the remittance sheet had written memoranda in lead pencil, "April 12th, 7th, 29th, 24th, May 1st, April 23rd, 17th, 4th, March 29th," which are in his own handwriting, as well as the amounts of money extended on the remittance sheet.

The remittance sheet, dated July 9th, 1885, he received and the pencil memoranda are his also. This is also put in evidence and marked Exhibit C, which is as follows:

BOSTON, MASS., *July 9th*, 1885.

Mess. Schutz Bros. & Blath.

DEAR SIRS: Inclosed we hand our check in settlement of bills as per memorandum below. Please acknowledge receipt and oblige,

Yours truly, JORDAN MARSH & CO.

116	July 6th,	7–10	4 25	June	8	(lead pencil mem.).
	6	"	222 00	Sept.	10	
	7	"	157 50	May	9	
	3	"	552 50	May	20	
	6	"	195 00	Sept.	12	
	3	"	90 00	May	12	
	7	"	202 50	May	26	
	7	"	166 00	June	3	
			1,589 75			
	Dis.		111 28			
			1,478 47			

The check, dated July 1st, 1885, to the order of the plaintiffs and signed by the defendants is produced, and the witness says that he received that check with the remittance sheet of July 1st, 1885, and that it is endorsed in the plaintiffs' firm name by Mr. Henry Schutz, one of the plaintiffs. The check is put in evidence and marked Exhibt D and is as follows:

$1,396$\frac{40}{100}$. BOSTON, *July 1st*, 1885.

The National Revere Bank of Boston pay to the order of Schutz Bros. & Blath thirteen hundred and ninety-six $\frac{40}{100}$ dollars.

No. 262. JORDAN, MARSH & CO.

(Endorsed:) For deposit. Schutz Bros. & Blath pay to J. T. Drown, Esq., cash., or order for collection acc't of Nat. Citizens'

Bank, N. Y. D. C. Tiebout, cashier. Pay only through
117 clearing-house to the Atlantic Nat'l Bank of Boston. James T. Drown, cashier.

That upon the receipt of the check and the remittance sheet he sent on the 3rd of July to Jordan, Marsh & Co. a receipt dated July 3rd, 1885, which is produced and identified by the witness as having been signed by him in plaintiffs' name, and is offered and read in evidence and marked Ex. E and is as follows:

Office of Schutz Bros. & Blath, cloaks and suits, 356 Broadway.
P. O. box 3191.

NEW YORK, *July 3rd*, 1885.

Messrs. Jordan, Marsh & Co.

DEAR SIRS: Please accept our thanks for your favor containing remittance.

Amount, $1,396.40, in settlement of bills as per statement rendered us, which has been placed to your credit.

With respect we remain very truly yours,
SCHUTZ BROS. & BLATH.
MOTT.

Q. Now, sir, referring to the memoranda comprehended in the phrase "memoranda below," on Exhibit B, I will ask you what is meant by the dates appearing in that memorandum below: June 28, ditto, ditto; 30, 28, 29, ditto; 30 ditto?

A. I don't know.

118 Q. You have no idea what that means?

A. No, sir.

Q. To enlarge upon it, what was meant by the figures 7–10, ditto, ditto, ditto, ditto?

A. That meant the terms—that is, the allowance of discount which is to be deducted. It implies that if the bills are paid in ten days from the date of the bill seven per cent. is to be taken off.

Q. Didn't you understand that the date June 28th, 28, &c., meant the dates of the bills?

A. No, sir; because they didn't.

Q. Well, I know that they didn't, in fact, correspond with any bills that were on your book as of those dates; at least, I believe so; but didn't you very well understand that Jordan, Marsh & Co. were paying bills that bore date June 28th, June 30, and June 29?

A. It was not my business to understand anything of the kind.

Q. What did you infer?

A. I inferred that the bills they were paying were the amounts that agreed with my ledger, and I checked them off accordingly.

Q. What did you infer as to the dates?

A. I drew no inferences.

Q. What inference would you draw from the mention of those dates?

A. I didn't draw any inference at all from the statement.

Q. And you mean that, do you?

A. Yes, sir.

Q. That you made no inference at all; that you drew no inference from that?

A. Yes, sir; I mean that.

Q. At that time you had on your book items of charge against Jordan, Marsh & Co. numbering over a hundred, did you not?

119

A. Yes, sir.

Q. Bearing different dates on your book?

A. Yes, sir.

Q. And the items being each of different amounts?

A. Yes, sir.

Q. And in order to keep matters clear and simple and straight, unentangled as between you and them, it was just as necessary that they should know what bills they were paying, was it not, as that you should know what bills were being paid; otherwise confusion would follow necessarily?

A. That is their own business, not my business.

Q. But confusion followed unless they knew that they were paying or meant to pay certain bills?

A. I can't say that; there was no confusion on my part on my books.

Q. The words in the receipt marked Defendants' Exhibit E, "as per statement rendered us," are written out, are they not?

A. Yes, sir.

Q. And are in your own handwriting?

A. Mine; yes, sir.

Q. Now, why did you add those words acknowledging the receipt of their remittance of $1,396.40 in settlement of bills, "as per statement rendered us?" Why did you add those words?

A. Well, to show that it was for that particular amount. That check I received in settlement of those amounts.

A. I understand you to state that it never occurred to you when you received the remittance sheet and sent the receipt that these dates that I have read had to Jordan, Marsh & Co. any significance at all?

A. No, sir.

Q. And you not only did not know what significance they had to Jordan, Marsh & Co., but you supposed they had no significance?

120

A. No, sir; I had no idea at all.

Q. And you supposed that they intended to pay the bills which bore date on your book corresponding to the pencil memoranda made by you?

A. Yes, sir; for that reason I put it on.

Q. Did you have on your books any item of charge against Jordan, Marsh & Co. of $146.25, dated June 28?

A. I don't think I did.

Q. Please give a definite answer to the question whether or not there is in your ledger account with Jordan, Marsh & Co. any item of charge against them of $146.25 under date of June 28th.

A. There are none.

Q. Is there any item of charge in that account of the amount of $146.25 under any date?

A. Yes, sir.

Q. Now, under what date have you an item of $146.25?

A. April 12, 1884.

Q. And that is the date that you have extended in pencil on this remittance sheet, Exhibit B?

A. Yes, sir.

Q. Now, please read that entry of April 12.

A. April 12, to merchandise as May 12, ten days, 7; folio 284; amount, $146.25.

Q. What did the date April 12 indicate?

A. The date the bill was purchased.

Q. What did the date May 12 indicate?

A. That was the thirty days' dating that they got.

Q. What does the seven off ten mean?

A. The discount which they were to be allowed if they paid it in ten days.

Q. Within ten days from May 12, 1884?

A. Yes, sir.

121 Q. They did not, in fact, pay until July 1st, 1885?

A. They did not.

Q. Fourteen months after?

A. Yes, sir.

Q. And then they took off a discount of seven per cent.?

A. Yes, sir.

Q. And you allowed it, did you?

A. I did.

Q. And why?

A. Because the bill wasn't due.

Q. Wasn't due?

A. By average; no, sir.

Q. Wasn't this item due? They were not paying the whole bill; they were settling for this item.

A. That don't matter. I take into consideration the entire account. The item was not due by taking into consideration the whole account.

Q. Let us see, now. You receipted for this check in settlement of bills "as per statement rendered us?"

A. Yes, sir.

Q. Now, didn't you understand that that check was meant to settle and did settle simply particular bills?

A. I did.

Q. Very well. Then if those particular bills were fourteen months overdue and were not entitled to a discount of seven per cent. upon the face, but if you were entitled to interest upon the whole face of those bills, why did you allow that discount on those particular bills without calling attention to it?

A. I told you before that I took into consideration the whole account and found it was not due by average, and expected more

remittances for the balance of account, and consequently allowed them $\frac{7}{10}$ on the bills they paid.

122 Q. How many customers does your firm have?

A. Oh, three or four hundred.

Q. Can you name another instance among all your customers in all the years that you have been connected with that house in which you ever received a remittance for an overdue bill—I won't say fourteen months overdue, but fourteen days overdue or at all overdue—and in which the person remitting took off a discount on particular bills and in which you ever rendered a receipt such as you rendered in this instance? Will you mention one other instance where you did that?

A. I cannot swear to one particular instance, but it has been done in a general way in business.

Q. Can you call it to mind if you look through your books?

A. Why, I don't know. Perhaps I might, but it would take some time.

Q. Can't you give any particular name or any one instance when you ever receipted in settlement of bills as per statement rendered, the bills being overdue, and you allowing a discount of seven per cent. upon the face of the bills, when, in fact, your firm was entitled not only to the full face of the account, but the interest upon it?

A. Well, I claim they were not overdue. You are asserting something which is not correct. I cannot answer that question. The firm was not entitled to interest on those bills, because they were not overdue; that account wasn't due until September, 1885, by average the entire account; it was not due until September 25th, 1885, according to my figures.

123 Q. Now, let us see. Do you mean to say that if Schutz Bros. & Blath had kept on dealing on ten days' discount with Jordan, Marsh & Co. that the account would never have come due; that as long as they had kept on dealing the account would never have come due? It never would, would it, on that theory?

A. Well, on that theory, certainly not.

Q. Have you any method of indicating on your book whether any particular bill is paid or not?

A. Oh, yes, sir. I make a small pencil mark alongside of the entry in the ledger. I did that with Jordan, Marsh & Co.'s account.

Q. Did you check off the item of April 12 as paid?

A. I did. It is a little dot opposite. That dot indicates that that item is paid.

Q. In other words, you consider that particular item as absolutely paid, and you did not treat this remittance of July 1st as a general payment on account?

A. I did.

Q. On the whole account?

A. I did. It was a payment of those bills of the whole account, making it a part payment of the entire amount.

Q. But you didn't apply it generally; you applied it specifically,

and so noted it in your ledger, to the discharge of the particular items testified by amounts in the remittance sheet?

A. Yes, sir.

Q. Who made out the bill of particulars in this case for your counsel?

A. I did.

Q. Now, why didn't you, in making out the bill of particulars, include all these items that were thus settled as debits against
124 Jordan, Marsh & Co. in your bill of particulars, and then give them credit simply for the actual amount of money that they remitted to you?

A. Because I thought it would simplify the account by making the bill of particulars out for what they owe.

Q. According to your theory, they owe interest on these paid bills, and also owe you the discount that they wrongfully took off?

A. We don't ask for it.

Q. But I mean why didn't you? You are not giving away things very much. Now, why not ask for it?

A. I didn't take the matter into consideration at all. I never thought of such a thing, to tell the truth.

Q. The amount of discount that they took off from the remittance of July 1st was $105.10?

A. Yes, sir.

Q. And the interest for the eight months after the lapse of six months would have been another $40 at six per cent. per annum, wouldn't it?

A. On the whole bill.

Q. The whole bill or the whole amount remitted is $1,300?

A. Yes, sir; about that—in that vicinity.

Q. It would be over $40 and nearer fifty, wouldn't it?

A. Yes, sir.

Q. So that on this one transaction alone you have, out of regard to convenience—if you please to term it so—waived a claim of $150?

A. I admit it was an oversight on my part; yes, sir.

Q. Have you any item on your ledger against Jordan, Marsh & Co., under date of June 28, of $243.75, being the second item in the remittance sheet, Exhibit B?

A. No, sir.

Q. Have you such an item on your books on any date, $243.75?

A. Yes, sir; I have two such items under different dates,
125 the amount being the same, and only two, as far as I know. They appear in my ledger under dates of April 7, 1884, and April 24, 1884. I have marked them in my book as paid, by the same pencil dot.

Q. What was the custom in your firm as to sending out statements to its customers?

A. We had no regular custom.

Q. Can you name another instance where you ever had a claim against a good party that was overdue eight months or fourteen months? Can you name another party that was good against

whom you kept a claim overdue for eight months or fourteen months?

A. Yes, sir.

Q. Name one.

A. A party in Norwich, I believe; one in particular—J. Strauss. The account is perfectly good. We never sent a statement yet, and he has owed the money a year or two, I believe.

Q. Is he still going on in business?

A. Yes, sir; paying up slowly. We consider him perfectly good and expect to get all our money.

Q. Why is he paying up slowly?

Q. That I don't know. It is his business, not ours, as long as we get it.

Q. Is it a case in which he wants, for reasons of his own, to pay slowly?

A. I don't know. We consider that we will ultimately get our money for the account.

Q. Now, have you any account on your ledger against Jordan, Marsh & Co. of $334.50, dated June 28th, 1885?

A. No, sir.

Q. Under what date have you such an item?

A. April 29, 1884.

Q. How are all these items noted on your ledger—as 7-10?

126 A. Yes, sir; with thirty days' dating.

Q. Did you have the name of Jordan, Marsh & Co. at the head of that account, or the name of Hewes?

A. Jordan, Marsh & Co.

Q. Did you have Hewes' name there?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. Now, think a moment.

A. No, sir, positively.

Q. Didn't have it there in pencil?

A. Well, might have had it there in pencil, he being the buyer.

Q. Pencil is as good as ink sometimes. Now, why did you say with positiveness just now that you didn't have it there?

A. I had forgotten, perhaps, that it had been there, but you refreshed my memory, sir.

Q. Do you mean to be understood that you had forgotten that you had Hewes' name down at the head of that account?

A. If we have it there.

Q. But don't you know now, as a matter of memory and as having the whole charge of these books from that time to the present, that you had his name at the head of that account in pencil?

A. I think I made a memorandum of his name on one of the ledger accounts; not on the head of the account, as you call it.

Q. Don't you know you did? I don't want any guessing about it.

A. Yes; I believe I did.

Q. You know you did, don't you, with no kind of doubt about it?

127 A. If you will let me look at the book I will tell you. (Examining the ledger.) I don't see it here. I can't say positively that I put the name down. I may or I may not have done so.

Q. Who has had the custody of this ledger?

A. I have.

Q. Is the other ledger here?

A. Yes, sir.

Q. Look and see if it is in that.

A. No, sir; I don't see it in this ledger, either.

Q. Who has had the custody of these two ledgers for the last several years?

A. I have.

Q. Have they been in your hands daily?

A. Yes, sir.

Q. Have you any doubt that as late as August, 1885, you had the name of John Hewes or Mr. Hewes in some form in pencil at the head of one of these ledger accounts?

A. I couldn't say that. It is not an unusual thing to put the name of a buyer down on the account, but I haven't it down. As I told you before, I wasn't positive. I might have and might not have.

Q. And, aside from the book, you have absolutely no memory on that point?

A. No, sir.

Q. Have you any memory of erasing it?

A. I have none.

Q. Have you any memory as to when you saw it last?

A. No, sir.

Q. If it should turn out that it was there, could you explain how it got off?

A. I could not.

Q. Will you show us in pencil the name of any buyer at the head of any account in your ledger? And I am taking the hazard of this, for I don't know anything about it.

A. I don't recall the name of any particular buyer.

128 Q. Here are your books, and I call on you to show if there is.

A. I don't know that I recall any particular case to mind like that.

Q. But don't you see that if there are only one or two of them you would be almost certain to remember?

A. I don't say that it is a usual thing, but I said it wouldn't be an uncommon thing.

Q. Is it on your mind that there is anywhere in the book any such thing appearing at the head of any account?

A. No, sir; I can't call it to mind.

Q. Don't you recall, Mr. Mott, looking over the account of Jordan, Marsh & Co. with Mr. Bassett, the book-keeper of Jordan, Marsh & Co., some time in the month of August, 1885?

A. Yes, sir; we looked at the books some time in that year, but I can't tell just when.

Q. And that he found the name of John H. Hewes then appearing at the top of the account?

A. I couldn't tell you that, as I told you before.

Q. And don't you know that you erased it since?

A. No, sir; I do not.

Q. Or that it has been erased with your consent or to your knowledge?

A. No, sir; I can truly say I haven't any knowledge of the fact.

Q. And you never heard of the erasure?

A. No, sir.

Q. Now, return again to Exhibit B. Have you in the ledger account with Jordan, Marsh & Co. any item of $243.75 under date June 30, 7–10?

A. No, sir.

Q. Under what date does that appear in your books?

129 A. April 24, 1884. That appears in the ledger account April 24, to merchandise, as May 24, folio 304, $243.75.

Q. Have you any item in the ledger account of $114 under date of June 28, 1885?

A. No, sir; I have no items entered in the year 1885, under date of June 28, 1885.

Q. Have you that amount or item entered under any date?

A. Yes, sir; I have; May 1, 1884. It reads May 1, 1884, to merchandise, as May 31, folio 316, amount $114.

Q. Have you in that ledger account any items of $146.25, $156, $68.25, and $48.75, under dates of June 29th, 1885, June 29th, 1885, June 30th, 1885, June 30th, 1885, respectively?

A. No, sir.

Q. Under what respective dates in that ledger account do these amounts appear, if these amounts appear in the ledger account at all?

A. I have them on the dates April 23, April 17th, April 4th, and April 29th, 1884, and under those dates they are entered under a thirty days' dating, 7 off 10 in each instance.

Q. Referring to Exhibit C, being the remittance sheet dated July 9th, I would ask you whether you have on your ledger account with Jordan, Marsh & Co. the items of $4.25, $222, $157.50, $552.50, $195, $90, $202.50, and $166, under dates of July 6th, July 6th, July 7th, July 3rd, July 6th, July 3rd, July 7th, and July 7th, 1885, respectively?

A. No, sir.

Q. Have you those particular amounts in that ledger account under any dates?

A. Yes, sir; I have. June 3rd, Sept. 10, May 9th, May 20th, Sept. 12th, May 15th, May 26th, June 3rd, 1884.

130 These amounts aggregate at their face $1,589.75 and the discount was $111.28. I treated that matter in my cash book exactly similar to the way I treated the remittance sheet July 1st,

1885, and made the pencil dots mem. in the ledger accounts to show that these items were settled.

Q. Your pencil extensions of dates upon these two exhibits, B and C, were meant by you to indicate the dates of the invoices of those amounts respectively as they appeared on your ledger?

A. Yes, sir.

Q. And those pencil memo's of dates are in substantially the same form, are they not, as the ink entries of dates on the left hand, made by Jordan, Marsh & Co.?

A. It appears so. I didn't ask any member of the firm of Schutz Bros. & Blath what he thought Jordan, Marsh & Co. meant by those ink entries of dates. I didn't write to Jordan, Marsh & Co. to know what they meant. I didn't think anything about it. The object of making the pencil memoranda of dates at all was to find out what bills they balanced in my ledger. I always do that when a party makes a payment to me.

Q. Why were not those bills due? Had there ever been an agreement with Jordan, Marsh & Co., to your knowledge, that all purchases should be averaged?

A. No, sir.

Q. Then why were not those bills due, and not only due but long overdue?

A. I don't know; it is not for me to say. In connection with Exhibit C, July 9th, 1885, I received a check of $1,478.47, dated July 9th, 1885, payable to the order of Schutz Bros. & Blath,
131 which bears the firm endorsement in the handwriting of Julius Schutz.

Check offered in evidence and read, marked Exhibit F, which is as follows:

$1,478.47. BOSTON, *July 9th*, 1885.

The National Exchange Bank, 28 State street.

N. E. B. pay to the order of Schutz Bros. & Blath fourteen hundred and seventy-eight $\frac{47}{100}$ dollars.

No. 259. JORDAN, MARSH & CO.

(Endorsed:) For dep. Schutz Bros. & Blath pay to J. T. Drown, Esq., cash, or order, for collection, acc't of Nat. Citizens' Bank, N. Y. D. C. Tiebout, cashier.

And I sent the receipt dated July 10th, 1885, for that check. The words "as per your statement" are in my handwriting.

Receipt offered in evidence & read, marked Exhibit G, and is as follows:

Office of Schutz Brothers & Blath, cloaks and suits, 356 Broadway. P. O. box 3191.

NEW YORK, *July 10th*, 1885.

Mess. Jordan, Marsh & Co.

DEAR SIRS: Please accept our thanks for your favor containing remittance.

132 Amount, $1,478.47, in settlement of bills, as per your statement, which has been placed to your credit.

With respect, we remain very truly yours,

SCHUTZ BROS. & BLATH.
MOTT.

I made out copies of invoices without dates, containing the number, quality, and price of the goods. Those were made out some time in January, 1885. They covered bills sold between May and December, 1884. I made out a separate bill for each item. There were about 50, more or less. They were made out all at one time, at the request of Mr. Robertson. I did not speak to the firm about it nor did any of them speak to me. Mr. Robertson came to the window of my office and told me he had received a letter from Mr. Hewes asking him to send copies of certain bills. He asked me if I would do it. I told him I would. I made them out and sent them with the dates off.

Q. What idea did you have as to the use that was to be made of them?

A. You will have to ask Mr. Hewes that. I had no idea at all.

Q. Be good enough to tell us of another instance with any customer when you ever made out bills in that fashion.

A. I cannot tell you of any other instance. I sent these bills by mail to John H. Hewes, Boston, Mass., perhaps to the care of Jordan, Marsh & Co.; I don't remember. I never made out any other blank-dated invoices. I received a remittance sheet in August, 1885, from the defendants (Def'ts' Exhibit A) and a check for $1,084.21.

133 I don't know what was done with it. It requested us to receipt in full for all bills up to that month, but I did not send such a receipt. I signed a receipt dated August 10th, 1885, which receipt is offered and read in evidence, marked Exhibit H, and is as follows:

NEW YORK, *August 10th*, 1885.

Received from Mess. Jordan, Marsh & Co. ten hundred and eighty-four $\frac{21}{100}$ dollars in settlement of bill July 22nd.

$1,084.21. SCHUTZ BROS. & BLATH.
MOTT.

I consulted with the firm as to what should be done in answer to the red-ink portion of that remittance sheet, which reads: "This is intended as a settlement in full for all our purchases of you up to the present month, and you will oblige us by sending us receipt to that effect or notify us to the contrary at once."

Q. What took place?

A. They sent a statement of the account entirely.

Q. Of course, when Jordan, Marsh & Co. notified you that they understood that this $1,084 covered everything between you up to that time, you imagined from that, did you not, that they were ignorant of this $32,000 claim of yours?

A. Naturally.

Q. And did not that affect you so seriously as to induce you instantly to confer with the firm about it?

A. During that day undoubtedly I did. I don't believe I rushed right in and told them about it.

134 Q. And as they requested an immediate answer on that important matter.

A. Within a reasonable time.

Q. They said "at once." Why didn't you at once either write them or wire them?

A. I didn't consider it as important as that. We were not afraid that Jordan, Marsh & Co. were going to run away because they did owe that amount. It was not necessary to telegraph or rush in.

Q. But imagining them to be in ignorance of this large claim; imagining from that that it could not appear on their books, you felt called upon, did you not, in justice to them to let them know that you had a claim of $32,000?

A. Yes, sir; I did.

Q. The receipt for that $1,084.21 sent to you on the 7th of August is dated by you on the 10th of August?

A. Yes, sir.

Q. Do you know when that receipt was sent to Jordan, Marsh & Co.?

A. No, sir.

Q. I hand you a letter dated August 24th, 1885, two weeks after the date of the receipt; in whose handwriting is that letter?

A. Mr. Julius Schut's, and it is signed by him in the firm name.

Defendants' counsel offered and read in evidence the letter marked Exhibit I, which letter is as follows:

135 NEW YORK, *August 24th*, 1885.

Mess. Jordan, Marsh & Co.

DEAR SIRS: We herewith enclose receipt for remittance, for which please accept our thanks; also herewith enclosed statement of your account as per request. Please excuse delay, as the person attending to that department has this day returned from his vacation. Trusting you will find the same correct, we remain,

Yours respectfully, SCHUTZ BROS., & BLATH.

It was my impression that I was away about that time.

Q. You were not away on the 10th of August, were you?

A. No, sir. I could have made the receipt and laid it in the drawer, for that matter.

Q. Do you know why it was that Jordan, Marsh & Co. were not

in some way informed during that two weeks that there was some unsettled claim against them?

A. No, sir; I do not.

Q. On previous occasions when you sent them receipts were the receipts accompanied by letters?

A. No, sir; just the acknowledgement.

Q. Why didn't you on the 10th of August, 1885, enclose them that receipt then, signed by you, with a brief memo., saying that there was a large claim on your books against them? Do you know why you did not do that?

A. I do not.

Q. You had returned on the 24th of August, 1885, when that letter was written?

A. I suppose so; yes, sir. I would not say positively. I presume I was back.

136 Q. This letter refers to a person tending to your department. Was that you?

A. Yes; I presume it was.

Q. And it says that you had that morning returned. Now, I want to see when you went away, if at all, and when you returned?

A. I cannot recall where I was, but, as the letter says, I presume I was back on that day. I won't dispute that.

Q. You don't know where you spent your vacation?

A. In 1885 I was in Plainfield, N. J. I believe I had a sick child at that time, in 1885. I believe I was in Plainfield, N. J., in 1885.

Q. And you think you remained away from the city how long?

A. I know I was away five or six days. The child was very sick, and I did not expect it was going to get through.

Q. Were you away from the 10th of August to the 24th?

A. I don't think I was for that extended period. Perhaps days between I would come to the store. I won't say positively.

Q. Get the letter book of August, 1885, and let us see whether there were letters written by you. Commence with August 10th. You were here on the 10th?

A. There is a letter that I wrote (indicating on the letter book) on the 10th. There is none on the 11th. I do not remember whether I was here on that day or not. I was here on the 12th and wrote a letter. Here is a letter dated on the 13th. I presume I was here. Then there is one written on the 14th of August; also on the 15th, but none on the 16th of August. There are some on the 17th of August by me, but none on the 18th or 19th. There are a

137 number by me on the 20th, 21st, and 22nd, but none by me or by anybody on the 23rd of August, 1885. I don't know whether the 23rd of August, 1885, was Sunday. I also wrote one on the 24th.

Q. Is it true that on the 24th of August, 1885, you had that morning returned from your vacation?

A. I cannot say.

Q. If it was so it was a pretty short vacation, wasn't it?

A. Yes, sir.

Defendants' counsel offers in evidence a letter, dated August 25th, 1885, from Jordan, Marsh & Co. to Schutz Bros. & Blath, which plaintiffs objected to on the ground that the defendants could not make evidence for themselves to bind the plaintiffs.

The COURT: "I think this so refers to what is in the letter and the statement which the plaintiffs made in their letter that it is admissible, and therefore I will admit it."

Plaintiffs except.

Letter read in evidence, marked K, and is as follows:

"BOSTON, *August 25th*, 1885.

Mess. Schutz Bros. & Blath, New York.

GENTLEMEN: Yours of yesterday's date is at hand. We are greatly surprised at the statement you sent us. Our remittance of August 7th covered the whole amount of bills rendered us to date, and, as we supposed, was in full for all goods delivered to us and not paid for previously, and we therefore could not have re-
138 quested the statement, as you stated in your letter. We cannot account for your neglecting to notify us of the demands you now make against us, running back so many months, as your statement indicates. None of the goods which you claim to have been sold us appear on our books of account, nor have you at any time heretofore made known to us the existence of such claims. We must, therefore, investigate your claim and ask you for your immediate and full explanation of your long and unaccountable silence, and also to send us itemized bill of what you now claim that we may be enabled to make a full examination into the same.

Yours respectfully, JORDAN, MARSH & CO."

Plaintiff's counsel offered in evidence the reply to the above letter, which is as follows, and is marked Plaintiff's Exhibit No. 13:

"NEW YORK, *August 26th*, 1885.

Mess. Jordan, Marsh & Co., Boston, Mass.

DEAR SIRS: You letter received, with contents noted, and have sent you to-day registered duplicate bills in accordance with your request. As regards your action in demanding the payment of our account, we have repeatedly instructed our salesman while there to see to get our account settled, and were always told our bills were at the office for payment, and while we continually expected to
139 receive remittance we did not deem it advisable to push claim, as we did not wish to lose your custom. We hope you will find everything correct, and remain

Yours very respectfully,

SCHUTZ BROS. & BLATH."

Q. You were the one that made out the statement, were you not, that was enclosed finally in the letter of August 24th, 1885?

A. Yes, sir.

Q. If you were not the person that was waited for, as alleged in the letter of August 24th, can you tell us who was?

A. I cannot.

Cross-examined by counsel for plaintiffs:

Q. What were your duties as book-keeper?

A. I did all that pertains to the book-keeping department; charged bills, entered invoices that were purchased, paid bills, received cash for bills we had sold, and made the pay-roll up for the factory; in fact, everything that a book-keeper has to do. All the book-keeping was done by me, and that comprises all my business for the house.

Defendants' counsel interrupts in order to ask a few additional questions, and in response the witness states that in 1882 Jordan, Marsh & Co. bought of Schutz Bros. & Blath $510.50 worth of goods and paid for it within 30 days, to the best of his recollection; in 1883, $3,516, and it ran 60 days, if he remembered rightly, and during the years 1884–'5, according to the books, they sold
140 them $35,000 or $37,000, and, excepting one item sold and paid for in the summer of 1884, they did not receive any payment other than the ones mentioned here.

Cross-examination resumed:

Q. While you are on the subject you may as well tell us what payments you did receive besides those in 1884 on account of goods sold to Jordan, Marsh & Co.

A. For the entire year 1884?

Q. Yes.

A. On the 15th of August, 1884, I received one remittance of $720.50; on the 8th of December, 1884, I received $1,789.

Q. Can you tell, while your hand is right there, what that was to pay for?

A. I could by looking at the remittance sheet much easier than I could trace it out here. I can tell——

Q. Is this the letter which brought you the money (showing witness a letter)?

A. Yes, sir.

Q. It was to pay a bill of what?

A. To pay bills; there were two bills—November 22nd and November 21st; I have them here.

Q. With what discount?

A. Net—net bills; there was no discount to be allowed.

Q. While we are on the subject I will ask you what efforts were made, so far as you know, by the plaintiffs after May, 1884, when this indebtedness began to accumulate, to get it out of the defendants.

A. We sent them several statements.

Q. Look at what I now show you and state whether it is a copy of the first statement.

A. Yes, sir; I prepared it and caused it to be mailed by the boy who was on the stand yesterday. The statement is
141 dated July 7th, 1884. It is a list of the debit of merchandise from and including March 29th to and including May 13,

1884—14 different bills. This list was taken from the ledger and is a correct transcript of the actual sales made Jordan, Marsh & Co. as they appear upon the books of my firm, and they conform exactly with the sales as claimed in the bill of particulars. The next statement rendered was dated November 8th, 1884, and comprised items from March 29th to September 27th, 1884, inclusive—about 30 items in all—which footed up to $4,520.13. There was another statement sent to Jordan, Marsh & Co. by mail November 8th or thereabouts. It covers from March 29th to November 3rd, inclusive, footing up $12,248.83, and comprises, I should think, 50 items.

Q. How did it happen that there were two statements rendered of the same date or about the same date, one containing all the October items and the other omitting them?

A. Perhaps that was the 18th. It is a little indistinct. I added additional bills; left out nothing that was in the former statement. Perhaps I sent this on the 18th instead of the 8th. It is a little indistinct here; I believe it is copied with letters of the 8th.

Q. See if it follows in regular course after letters from the 10th to the 17th.

A. No; there are two letters of the 19th in between, but a page could have got stuck.

Q. And it is a correct statement of the unpaid bills for goods rendered to Jordan, Marsh & Co. as they then stood on the books of your firm?

A. Yes, sir.

Q. And corresponds, I understand, exactly with the bill of particulars subsequently prepared by you?

A. Yes, sir.

142 April 14th—that is another copy statement sent by mail to Jordan, Marsh & Co. prepared by the witness, which covers dates down to April 11th, 1885, as they then stood on the books of the firm, and foot up to $24,444.33, and was taken from the firm ledger and are identical with the charges on the bill of particulars.

Q. Then, as I understand, there was no other statement of that character sent until August, after the difficulty arose, when, at the request of Jordan, Marsh & Co., a further full statement was sent?

A. Yes, sir.

Q. When the goods were sold by your sellers what did you have to do with making out or copying or sending of a bill or invoice of goods?

A. I first received the order—the original order—that was sent in by the salesman; then it was my business to take that order, examine it, and see that the prices were correct. When I found them correct I entered that order in an order book, which was handed to the clerk who selected the goods, with cloaks—a young man did it; with suits—the young lady who testified here yesterday. When the goods were ready to be shipped they entered it in the charge book, which came to me direct after being checked by one of the firm that the bills were O K, and if the checks were to go I would take that charge book and enter the entry into my sales book; then I

again took our price-list and compared it with this charge to see if the clerk had not made an error in charging these goods at too low a figure or too high. After that I calculated the thing, extended it, and sent by mail——

143 Q. How soon after the actual shipment of the goods in each case was it the usual course to have this bill prepared and mailed?

A. The same day.

Q. Was this course uniformly pursued in all these sales to Jordan, Marsh & Co. which appear upon the books of your firm and in the bill of particulars?

A. They were.

Q. State how these letters or invoices were inclosed or directed.

A. They were put into an ordinary commercial envelope marked from Schutz Bros. & Blath, importers and manufacturers of ladies' cloaks and silks, 356 Broadway, N. Y. I then enclosed the bill and sealed it and handed it to the boy to mail, and also the stamps, and he stamped them and delivered them to the P. O. box, and they were directed to Jordan, Marsh & Co., Boston, Mass. No other name was on any of them.

Q. Was it your belief and understanding that they were received by Jordan, Marsh & Co.?

A. Yes, sir; we never received any letters back by the U. S. Government in all the time I was sending bills, and if a letter does miscarry it always comes back.

Q. Have you any reason to believe or suspect that they were diverted from the hands of the firm of Jordan, Marsh & Co.?

A. I had not.

Q. It appears by the letters, August, 1885, when your final account was rendered to Jordan, Marsh & Co. of these bills now in suit, that they demanded an investigation. Do you know of any investigation being made at your store by them or their employees?

A. Do you mean in August, 1885?

Q. Yes.

144 A. I believe Mr. Bassett called at the store. Mr. Bassett came to see us and asked for the ledger account of Jordan, Marsh & Co. with our firm, which was submitted to him; he examined it. I went through it with him and he said it was apparently all right. When Mr. Robertson asked me, in January, to send him some blank dated bills for 1884 then unpaid, I had no communication with any one but Mr. Robertson about it; did not communicate with any one of the plaintiffs. The particular bills which were sent with each invoice of the goods contained the details of each sale, and were not a naked statement of the dates and amounts as the November and April statements were. Mr. Robertson, in January, asked me to make out duplicate bills, as Mr. Hewes had requested him to send them, and I think he said that the bills were soiled. The fact did not impress me as of any importance. I made no entry of them and there was nothing to bring them to the notice of the firm.

Q. Of course, you saw July 6th, 7th, 3rd, 7th, in Exhibit C, and

June 28th, 30th, 28th, 29th, in Exhibit B, did not conform to the dates of sale which appeared in your letter?

A. Yes, sir; I saw that.

Q. And that seven-ten, although a correct description of the character of the sales, was not correct as applied to ten days from the date here fixed, didn't you?

A. Yes, sir.

Q. So that the full effect of the change of date from the actual date as it appeared in your ledger to the date assigned to these amounts in these two remittance sheets was called to your attention?

A. I suppose I noticed it; yes, sir. I paid no particular
145 attention to it.

Q. Down to the time when your firm received the letter of August 25th, 1885, had you any reason to believe or any suspicion that all the goods which stood charged to them upon your books had not been received by them in due course after the delivery of them to the express company?

A. No, sir; none whatever.

Q. Had you any reason to believe that Jordan, Marsh & Co. had not received in due course the bills or invoices sent by you?

A. No, sir. I knew they must have received them, because none ever came back. A letter that is not delivered is always returned by the P. O. authorities, and none ever came back.

Q. Had you any reason to believe or any suspicion that there was anything going on in their house by which these documents were being diverted or could be diverted from the attention of their house?

A. I had not.

Q. So I ask you of the statement that you sent in August, November, and April. Had you any reason to believe or suspect or did you suspect that these statements were not received by Jordan, Marsh & Co.?

A. No, sir; they were sent in the same way and addressed the same. A letter was sent to Jordan, Marsh & Co. as follows:

146 NEW YORK, *Feb. 28th*, 1885.

Mess. Jordan, Marsh & Co.

GENTLEMEN: Will you kindly inform us if two suits came with your bill of goods sent you on the 27th which were not charged in the invoice marked W. & A. 711.

An early reply will be very much appreciated by,

Very truly yours, SCHUTZ BROS. & BLATH.

Then on March 6th, 1885, this letter was sent:

Jordan, Marsh & Co., Boston, Mass.

DEAR SIRS: We would respectfully call your attention to our letter of the 28th, wherein we asked you if two suits were received by you not charged in the invoice marked W. A. 711. We have

not heard from you, and we ask that you would give this your early attention, and greatly oblige,

Yours truly, SCHUTZ BROS. & BLATH.

This letter was written by Mr. Blath. The amount of the invoice was $394. It is part of the claim in this action. The letter was sent by me.

The following letter the witness read from the copy book and identified the letter as copy of letter sent by the plaintiffs:

NEW YORK, *March 21st*, 1885.

Mr. John H. Hewes, Boston, Mass.

147 DEAR SIR: I expected a remittance from your house this week, and reported to my folks that you would see about this matter. We are in need of money much, and would therefore request you not to forget us. Hoping to hear from you, I remain,

Yours very truly, HENRY BLATH.

Also letter dated April 7th, 1885:

Mr. John H. Hewes, Boston, Mass.

DEAR SIR: Having not heard from you since my letter some time ago, I would request you to inform me when we may expect some remittances from your house. Hoping to hear from you soon, I remain, with kind regards,

HENRY BLATH.

Also one dated May 29th, 1885:

Mr. John H. Hewes, care Jordan, Marsh & Co., Boston, Mass.:

Received no remittance from your house as promised; heavy payments to meet and must have remittances. Telegraph answer.

This telegram is in the handwriting of Mr. Julius Schutz.

Also letter of June 10th, 1885, in handwriting of Mr. Julius Schutz:

Mr. John H. Hewes, Boston, Mass.:

We expected, according to your promise, that you would certainly make us a part remittance at the beginning of this week.

148 Up to date we have not been in receipt of any. Please see whether your house has attended to same. By so doing you will greatly oblige,

Yours very respectfully, SCHUTZ BROS. & BLATH.

Also similar telegram of date June 13, written by me for Mr. Julius Schutz, as follows:

Mr. John H. Hewes, care Jordan, Marsh & Co., Boston, Mass.:

I received no remittance from your house as promised. Return telegraph answer.

Also similar telegram of 15th of June, written by me for Mr. Julius Schutz:

Mr. John H. Hewes, care Jordan, Marsh & Co.:

I received no reply to my telegram of 13th. Telegraph instantly.

(S'g'd) JULIUS SCHUTZ.

The next telegram, of June 16th, 1885:

Mr. John H. Hewes, care of Jordan, Marsh & Co.:

Received no reply to the two telegrams and letters sent you. We must have remittance, having very heavy payments to meet this week. Telegraph answer without fail.

SCHUTZ BROS. & BLATH.

That is my handwriting, signed by me. Mr. Schutz authorized me to do it.

Also June 19th, 1885, a telegram written and signed by me:

149 John H. Hewes, care Jordan, Marsh & Co.:

Received no check to-day from your house as promised. Has same been mailed? Telegraph answer.

SCHUTZ BROS. & BLATH.

Also letter dated June 4th, 1885, directed to John H. Hewes, Esq.:

Enclosed we herewith send you bill for suits, garments spoken to you about by our Mr. Schutz. We have put the same at extreme low figures, and hope you will make good profits on them.

Thanks for your kind patronage.

We remain,

Very truly yours, SCHUTZ BROS. & BLATH.

Mr. Julius Schutz wrote that letter.

Redirect examination by Mr. MYERS:

Q. The letter of August 24th, 1885, written by your firm refers to the person tending to that department, does it not?

A. Yes, sir.

Q. Who else attended to that department besides yourself?

A. Nobody but me.

Q. Then you must have been the one referred to.

A. I do not doubt I was.

Q. Did you see the letter which Jordan, Marsh & Co. wrote on the 25th of August and which I read in evidence, being an answer to the one of your firm of August 24?

A. No, sir.

Q. You did not see that letter?

150 A. No, sir.

Q. That letter of August 25th asserted that they had been kept by your firm in ignorance of this claim?

A. Yes, sir.

Q. Now, if they had been kept informed of the claim they must have been kept informed by you, as you were the man that sent statements. Is that so?

A. It is to be presumed so.

Q. So that you were the only one who did all that was done towards informing Jordan, Marsh & Co. that they were in debt?

A. I suppose so.

Q. That being fixed, I call your attention to the fact that Jordan, Marsh & Co.'s letter of August 25th accused your firm of keeping them in ignorance of this claim.

A. That letter did. The letter says so.

Q. With that accusation before your firm, do you know how it happened that they did not inquire of you whether you had kept Jordan, Marsh & Co. in ignorance or whether you had kept them informed?

A. I cannot say.

Q. Did they inquire of you?

A. They did not.

Q. Can you explain why?

A. I cannot. You must ask Mr. Schutz.

Q. Did you tell them whether you had kept Jordan, Marsh & Co. informed?

A. They did not ask me. How could I tell them?

Q. Now, if in truth you sent to the firm of Jordan, Marsh & Co. by mail, directed to the firm, the statements of July 7th, 1884, November 8th, 1884, and the second statement of November 8th, 1884, or 18, whichever it may be, and again the statement of April 14th, 1885, the latter being for $24,000 and odd—if you did send those statements to the firm in point of fact, can you explain—es-
151 pecially with reference to the one of such late date as April, 1885, for $24,000—can you explain why your firm in its letter of August 26th, in reply to the accusation that you kept the firm in ignorance, did not refer to the fact that that statement copied in your book had been sent to Jordan, Marsh & Co.?

A. I cannot answer that. It is beyond my province.

Q. Did you send that statement of April 14th, 1885, for $24,000, because you considered the account due?

A. An account is always due, as far as that goes. If a man has a mind to take off his discount we will accept money any time.

Q. It appears that you personally wrote out the telegrams of June 16, 1885, June 13th, 1885, June 19th, 1885, those three telegrams, which are in your handwriting, being dunning telegrams.

A. It looks that way.

Q. Especially following each other in such rapid succession?

A. Yes, sir.

Q. Did you then consider the account overdue?

A. I only wrote those at dictation.

Q. Did you consider no part of the account as overdue at that time?

A. I have not any answer to make to that question, as I did not dun the parties myself. I simply wrote at dictation.

Q. You stated heretofore that you had allowed those discounts on those two remittances because you considered that the account was not due?

A. Yes, sir.

Q. And that was as late as July 1st and July 9th, 1885.
152 Now, if the accounts were not due, why were you dunning almost daily and by telegrams of June 15, June 16, June 19? If the account was not due why were you dunning, and if it was overdue why did you allow the discount?

A. I say again, I did not dun for the money.

Q. Why didn't you tell the gentleman who told you to write it that the account was not due and that he ought not to dun?

A. We are always ready to receive money at any time.

Q. Do you mean that your are always ready to dun for undue accounts?

A. No; but at some time, of course, these bills would be overdue, as a matter of fact; if we stopped selling to the parties, their bills would run on and finally become due.

Q. Do you know, was the firm anxious for money at that time?

A. You will have to ask them. I cannot answer for them.

Q. You don't know?

A. No, sir.

Q. They never told you?

A. No, sir; that they were anxious for money; no.

Q. Didn't you at their dictation write words to that effect, that they were anxious for money?

A. I did.

Q. If they dictated it, then they did tell you they were anxious for money?

A. No; they did not address it to me.

Q. They uttered in your hearing the words that they were anxious for money?

A. They did.

Q. That being so, why didn't you address these telegrams or one of them to Jordan, Marsh & Co. direct?

A. Because I did not send them. I sent them at dictation.

Q. Do you know how it happened that your firm did not
153 direct those telegrams or one of them to Jordan, Marsh & Co. direct?

A. I do not know.

Q. Did you compute the interest on this claim yesterday?

A. Yes, sir.

Q. You made it up over $4,000, didn't you?

A. I don't remember.

Q. Don't you remember that fact, that the interest you counted up was over $4,000?

A. No, sir; I tore the paper up. It was only a memorandum paper.

Q. How is it that your memory as to that matter of interest on this claim computed yesterday is so dim, and yet you remember the sending of a statement two years ago?

A. You are asking me now to remember figures exactly.

JOSEPH M. BASSETT, sworn and examined as a witness for the defendants, testified that he is the book-keeper for the defendants

and has been for about five years and stated that when statements came to Jordan, Marsh & Co. they were received by him.

Q. Did you hear Mr. Mott state that a statement was sent to Jordan, Marsh & Co., dated April 24th, 1885, amounting to $24,443.33?

A. I did.

Q. Did you ever receive any such statements?

Objected to as being immaterial.

The COURT: If they were actually mailed and were not received, I don't see how they would be affected by their being mailed.

Mr. CHOATE: I do not understand him to say that he opened any letter or that any letter came to him.

154 By the COURT: No; but in the course of their business I understood him to say that letters containing such statements would come to him. I think it is admissible for what it is worth to the defendants (to show that they did not reach the firm in the regular way) for him to state that they did not come to him. I do not mean by that that that proves that they did not come on at all, but the point now is whether the proof is admissible at all, not what the effect of it is. I think it is.

A. I did not receive any such statement.

The witness also states that he did not receive either of the statements dated November 8th, or 8th & 18th; that after the receipt of the statement dated August 24th, 1885, and about the 5th of September, he visited the plaintiffs' office, in New York, and went through the ledger account of Jordan, Marsh & Co. on the books of Schutz Bros. & Blath; spent about an hour in the examination of the books.

Q. Did you have any conversation at that time with regard to the sending of statements?

A. I did, with Mr. Mott.

Q. Do you recollect that one of the firm was present at that conversation?

A. I do.

Q. Have you any impression on your memory as to which one it was?

A. My impression is that it was Mr. Blath.

Q. And do you remember that you were accompanied by one of the firm in that investigation at that interview?

A. I do. I asked Mr. Mott if he ever sent any statements to Jordan, Marsh & Co. He said he did not until the one was sent which I had in my hand, which was that statement of August 24th, 1885. He referred to that only.

155 Witness further testified that the firm of Jordan, Marsh & Co. received about four or five hundred letters daily.

Q. The corresponding clerk had charge of the division of the mail, did he not?

A. He did.

Q. And in what manner, to your knowledge, was it divided?

Objected to. Exception by plaintiffs.

A. It was opened by the corresponding clerk first; then sorted into the different departments to which he sent the mail. For instance, the bills themselves went into one drawer; the letters relating to the accounts went to the man who kept that part of the ledger; letters relating to goods went to the buyer; statements invariably went to me.

Q. You do not mean the original bills or invoices?

A. No, sir.

Q. But what is technically called statements?

A. Yes, sir; statements.

Q. The bills or invoices were put in one place by themselves, you say. Were they divided as between the wholesale and the retail departments?

A. They were.

Q. The wholesale bills went into one place?

A. They all went together, but they were divided by each man from the departments coming and sorting the m—, the clerk from each department.

Q. So that all the bills for all the retail departments went together?

A. Yes, sir.

Q. And how many of those retail departments were there?

156 A. There were in all, I should think, over sixty. Mr. Hewes' department was one of the retail departments, called the cloak and suit department, and numbered one.

Q. Then, after these bills for these 50 or 60-odd retail departments were put together, what became of them?

A. They were each put into a box, the same number as the department, to which box the buyer had access and was expected to go there and take the bills and see that his goods got there, and to see that the prices were right, and also, in course of time, to put the selling price on the bills in pencil. The selling price was to correspond with the selling price that was put on a ticket on the goods. He also had to O K or to check the bills. The bills could not get on our books until they had been passed on or O K'd by the buyer. The bills ordinarily would come to the buyer about an hour after the distribution by the corresponding clerk, and until the bill reached the buyer it would not pass under any other supervision than I have mentioned, and unless the bill was checked and returned by the buyer I would never see the bill again. I had special charge of the purchase ledger, and in it I kept only the accounts of all the people who sold goods to Jordan, Marsh & Co. There are about 1,500 accounts on that book. As a matter of convenience I kept small accounts, accounts with people from whom we would buy very little, aggregated in an account called sundry accounts. We had a ledger account headed Schutz Bros. & Blath, in 1883 and 1884, down to about the middle of the year. Then we abandoned it.

Q. Did you have any account after June, 1884, in the purchase

ledger in which any items referring to Schutz Bros. & Blath were entered?

157 Objected to by plaintiffs' counsel as immaterial. Objection overruled and exception.

A. I cannot state without referring to my book. I closed our ledger January, 1885, and commenced a new one February, 1885, and about the 1884 ledger I cannot state. I think in November, 1884, we had one item of Schutz Bros. & Blath, which was, I believe, paid, but beyond that I cannot state without referring.

Q. After the bills had been received and checked by the buyer did they find their way to a man who kept a book called the *entire* book?

A. They did, but not directly. The bills came to me for entry in the purchase ledger to the credit of the person who sold them. I make the entries into the entry book from the purchase ledger and not from the bills. The goods with the terms of purchase are entered and charged in the entry book against the department into which they have gone as goods gone into that department. My first business was to take the bill and see if it was due at once, before posting it. If they were immediately due I took immediate precaution to pay them at once in order to get the biggest rate of interest or discount, and if they were not immediately due they were passed to my assistant to file and to prepare for payment at the end of the month, at which time we make up our average. To save sending a multitude of checks we make up an average once a month and send one check for all the bills bought in the month, providing that they were not due before the month closed.

158 All bills that came in in a particular month were made ready to be paid at the end of the month and the discount on each item ascertained and deducted. I or one of my assistants made out checks, which were then signed by one of the firm, and when signed it was sent to the firm which sold the goods, and was accompanied by a remittance sheet made by me or my assistant under my direction showing what bills were paid by that check. I kept charge of the bills that were thus paid or my assistant. I had practically charge of auditing and paying the bills for the retail departments and wholesale.

The foregoing testimony with regard to the custom of the witness in paying the bills, etc., of Jordan, Marsh & Co. is all taken subject to the objection & exception of counsel for plaintiffs.

The witness continues and states that neither Mr. Robertson, the salesman of Schutz Bros. & Blath, nor any one of the plaintiffs had any conversation with him in regard to the payment of any bills against Jordan, Marsh & Co., nor did he ever receive any letters from the plaintiffs in regard to the payment of any bills or any telegrams.

During my examination at the plaintiffs' store, in New York, in September, there was shown to me a ledger; whether there were one or two I cannot decide. The book-keeper, Mr. Mott, who was on the

stand yesterday, showed them to me in the presence of the other gentleman to whom I referred yesterday. I don't see him here, but I think I could recognize him. I think I saw him afterwards in Boston, at the Parker House, and in this court-room yesterday. I examined that ledger or those two ledgers, whichever it may have been, in connection with this statement of date August 24th. This other gentleman was present most of the time. I examined no account but one headed "Jordan, Marsh & Co." At the head of that account, in one of those books, the name of Hewes appeared—at the head of the ledger, in pencil—"J. H. Hewes." Yesterday, while the book-keeper, Mr. Mott, was on the stand, two ledgers were handed to me in the presence of the court as the two ledgers of Schutz Bros. & Blath, and I was requested to examine every page of those ledgers to see whether any person's name appeared in pencil at the head of any account in either of those two ledgers. I made that examination. In one account there were three names as endorsers, and that was the only one that I found a name on. The ink entry is "Buckley & Co., Utica, N. Y.," and at the left, in pencil, "John Buckley, William E. Shirley, A. J. McIntosh, endorsers." Excepting upon that one account, I did not anywhere else in either of those two ledgers find any name in pencil at the head of any account. The name of Hewes did not appear at the head of that account yesterday when I examined the ledgers.

159

Q. Suppose the only terms indicated on the bill are thirty days, dating seven-ten, when does such a bill mature?

A. In forty days from the original date.

Q. Do you remember of any correspondence in the month of October, 1885, with Schutz Bros. & Blath in regard to some goods that came to the house of Jordan, Marsh & Co., after Jordan, Marsh & Co. claimed to have discovered the nature of the arrangement between Schutz Bros. & Blath and Hewes?

A. I do. Those goods were all returned to Schutz Bros. & Blath.

160

Defendants' counsel reads in evidence the following letters:

NEW YORK, *October* 2, 1885.

Mess. Jordan, Marsh & Co., Boston, Mass.

GENTS.: On the 14th of May we received an order from you for plush cloaks, deliverable end of September and beginning of October. Samples have already been delivered and the goods are now ready, subject to your order. Will you kindly indicate to us when and how we shall ship them to you? Notwithstanding the pendency of suit on previous bills, we are disposed to carry out and perform the above contract, as well as any future one, should you be inclined to favor us therewith.

We remain yours very respectfully,

SCHUTZ BROS. & BLATH.

Marked Defendants' Exhibit M.

BOSTON, *October 6th*, 1885.

Mess. Schutz Bros. & Blath.

GENTLEMEN: We are in receipt of your letter of the 2nd inst. In reply we have to state that we were not aware that you had any unfilled orders from our house. As the question of the validity of your transaction with Mr. John H. Hewes is in question in the suit which you have brought against us in New York, we hardly thought it necessary to repeat to you that we do not recognize any obligation or liability on our part by reason or on account of any pretended arrangement, understanding, or contract that you may claim to have or to have had with Mr. Hewes, and we beg to inform you that we do not recognize any orders placed by Mr. Hewes with you as binding upon us, and we decline to receive or be responsible for any goods by reason of such orders.

Respectfully yours, JORDAN, MARSH & CO.

Marked Defendants' Exhibit N.

Defendants' counsel continued reading letters in evidence as follows:

161 BOSTON, *October 10th*, 1885.

Mess. Schutz Bros. & Blath, N. Y.

GENTS: We were surprised to-day to find an invoice from you dated October 9th, 1885, and upon enquiry we are informed that four cases have this day arrived, which we suppose may have reference to this invoice, numbered 780, 781, 786, and 788. We wrote you the sixth inst., in reply to yours of the 2nd inst., that no orders for goods placed with you by Mr. John H. Hewes would be recognized by us, and that we should decline to receive any goods on account of such orders, if any. We have to inform you, therefore, that the above-mentioned cases are unopened, and are not accepted by us, and are held subject to your orders and for your account and at your risk, and in absence of any orders from you shall have — stored at your expense.

Yours respectfully, JORDAN, MARSH & CO.

Marked Defendants' Exhibit O.

BOSTON, *October 12th*, 1885.

Mess. Schutz Bros. & Blath.

GENTLEMEN: In accordance with your despatch of this date, just received, as follows, "If you don't wish to keep goods sent please return same by N. Y. & Boston Despatch Company," we have reshipped the goods mentioned in our letter to you of the tenth inst. back to you by above-mentioned express to-day and herein return bill received from you, dated October 9th, 1885, for amount of $2,384.50.

Yours respectfully, JORDAN, MARSH & CO.

Marked Defendants' Exhibit P.

NEW YORK, *September* 18*th*, 1885.

Mess. Jordan, Marsh & Co., Boston, Mass.

GENTS: We received your telegram, and in reply would say that your representative called upon — and enquired regarding your account and stated then that he found everything satisfactory. We have since awaited check from you and wrote several times for same without any reply. We desire to assist you in any investigation you may wish, but must earnestly request you for payment of our account, and if entire amount is not convenient you can send us check for a part thereof. Awaiting your prompt attention to above by return of mail, we remain,

Respectfully yours, SCHUTZ BROS. & BLATH.

Marked Defendants' Exhibit Q.

162 BOSTON, *September* 21*st*, 1885.

Mess. Schutz Bros. & Blath, N. Y.

GENTLEMEN: Yours of the 18th received, and in reply we have to state that our investigations thus far have not satisfied us that the claims which you make against us are well founded, and if any one has said to you that everything was satisfactory he certainly did not represent us, as such a statement is untrue. You must have been mistaken about it. We pay all just claims against us promptly, in fact anticipate them, and have no need of your proffered indulgence.

Yours respectfully, JORDAN, MARSH & CO.

Marked Defendants' Exhibit R.

Q. Do any of the goods sued for in this action as unpaid appear on that purchase ledger anywhere?

A. No, sir; they do not. There is nothing in that purchase ledger to the credit of Schutz Bros. & Blath except what was paid them. There is one item in 1885 that is not paid for, I believe. On the purchase ledger for 1885 we have no account headed "Schutz Bros. & Blath," because in 1884 we only had four items on the account, and in 1885 we did not commence apparently to buy from them until, I think, in June, and, judging from the account with them in 1884, I did not think we would have accounts enough with them to open a special account with them, so the few items for that year, 1885, in which they were interested appear under the heading of sundries, "S." There is one item in that year, 1885, in that sundry account that is not paid for. I do not find it here. All the other items that appear in that sundry account for the year 1885 were paid for. The unpaid item is the last item on this statement and is dated July 30th as August 29th, $108.75. I don't remember when or how that item first came to my knowledge;

163 some time in 1885.

Witness identifies the nine bills as comprising the items referred to in the remittance sheet of July 1st, 1885, and they are put in evidence by the defendants as exhibits and are annexed hereto, marked

Exhibits S, T, U, V, W, X, Y, Z, and A A, and also eight exhibits referring to items in remittance sheet of July 9th, 1885, which are annexed hereto & marked Exhibits B B, C C, D D, E E, F F, G G, H H, and I I.

Q. Opposite the amounts of money on the two remittance sheets of July 1st and July 9th, which were introduced in evidence yesterday, are certain dates in ink (showing witness the remittance sheet).

A. There are. They meant the dates of the bills as they were passed in to me to pay, as they reached me to pay. These dates thus appearing in ink were on the bills when they came in to me to pay.

Q. Referring to the remittance of July 1st, 1885, are these the bills (Ex's S to A A), the particular bills, that were meant to be paid by that remittance (handing witness papers)?

A. They are, and the dates in them correspond with the dates extended on the left in ink on the remittance sheets. I made the computation on the back of one of those bills of the amount of discount to which those bills were subject. That figuring and writing is in my handwriting.

Q. In respect to the remittance of July 9th, 1885, are these the bills that I now hand you (Ex's B B to I I) that were intended to be paid by that remittance (handing witness papers)?

164 A. They are, and there is a computation on the back of one of those bills in the handwriting of one of my assistants. That made the net amount $1,478.47, and I sent the check for that amount. He states that all these bills thus intended to be paid by these two remittance sheets of July 1st and 9th, 1885, had been passed by Hewes, and they thereupon were entered in his ledger and settled accordingly.

Q. Were you ever advised in any way by Schutz Bros. & Blath, or by anybody representing them or connected with them, that there were no such bills on their books as those settled by those two remittances of July 1st and 9th?

A. I was not. I discovered that for the first time when I made that examination, in September, 1885.

Q. I hand you remittance sheet of August 7th, 1885, marked Defendants' Exhibit A, bearing a memorandum in red ink. Prior to that of August, 1885, had any such remittance sheet ever before been sent to Schutz Bros. & Blath?

Objected to as immaterial; objection overruled; exception by pl'ffs.

A. There had not.

Q. I want to know whether or not, so far as you know, the fact appears on any book that these goods sued for went into that establishment.

A. With that one exception that I cited it does not. That one exception is the item of July 30, 1885, of some hundred odd dollars, and as to that item there is nothing except this bill checked by

Hewes and the entry from that bill in the book, the entry in the book being predicated on that bill.

165 Q. Assuming for the moment that the goods sued for went into the establishment of Jordan, Marsh & Co. and into the department managed by Hewes or any other department, and that they were sold either in whole or in part, is there any way known to you—is there any way that could be ascertained what became of these goods?

A. There is no way.

Cross-examination:

The witness states that he should say from memory that he did not receive the statement of July 7th, 1884; that he had never seen it since, and that his memory ran back there that he never received it. The bill for the sale of July 30th of $108.75 he received in the regular course from Mr. Hewes, and the firm never paid it, because he was instructed not to, on account of the litigation, and the retention of that amount has been intentional on the part of the defendants; and also states that a record is kept of the package number of goods received in the establishment of Jordan, Marsh & Co.

The package books are produced and an examination made.

Witness states that all the goods came into the receiving-room, which was in charge of Mr. Erlacher and Mr. Buckley, his assistant, so that he supposed that Mr. Erlacher and Mr. Buckley had knowledge of all the packages that came into the store, and these package books were kept by the men who took the packages.

Q. Now, I want you to take the ledger of the plaintiffs and say which ledger it was you saw at their store in August.

166 A. B ledger, page 248. I speak from memory. Here is one of them. I saw the pages that contained Jordan, Marsh & Co.'s account; there are several pages.

Q. Did you see it in more than one book?

A. I don't remember.

Q. Is there anything by which by reference to the account which you hold in your hand you could determine?

A. Yes.

Q. What?

A. By these check-marks.

Q. In one of these books you saw the name of Hewes written in pencil?

A. Yes, sir.

Q. Was it in more than one place?

A. No, sir.

Q. Whereabouts on the page did you see it?

A. Under—not directly under, but a little to the side of the name of Jordan, Marsh & Co.

Q. A little to which side of Jordan, Marsh & Co. did you see the name of Hewes in pencil?

A. Speaking from memory, I should say the left.

Q. Above or below?
A. Below.
Q. Did you know in whose handwriting it was?
A. I did not know positively, but from comparison with the handwriting in the book I should say it was in Mr. Mott's handwriting.
Q. How many books did you examine there?
A. I saw two ledgers.
Q. Can you tell from memory which of the two it was?
A. From memory I should say it was on page 148; there (indicating).
Q. To the left and a little below Jordan, Marsh & Co.?
A. Yes, sir; speaking wholly from memory after over two years.
167 Q. See if you find the name there.
A. I cannot detect any remains there of writing.
Q. Do you detect there any indications of any erasure or tampering with that page?
A. I detect none.
Q. Now, to do you full justice, look at the other ledger, page 222, if that was the page you looked at; then I will show them both to the jury.
A. No, sir; I do not find it.
Q. And that is where you thought it was, page 148 of ledger B?
A. Yes, sir.
Q. You neither find the name nor any indications of the least erasure or tampering with the page?
A. Not that I can detect. (After bringing book nearer to the light:) I can detect an erasure here now. Evidently a rubber has been put on——
By Mr. CHOATE: Rubber, and not dirt?
A. Rubber, and not dirt. I will not swear it was rubber; it was something. It has been erased there.
Q. You think you can see it?
A. O, yes.
Q. Is that the beginning of the account?
A. It is the beginning of the account.
Q. I want to ask you something further about the books. When goods are sold—for instance, when a cloak or suit was sold—when it got into the books was it merely a cloak or a suit, or was the kind, character, or quality indicated by some number or other description?
A. It was merely a cloak or suit, not a number; so many cloaks, so many suits. Mr. Eben D. Jordan was away in Europe some time between May, 1884, and July, 1885, and during that time Mr.
168 Marsh and James C. Jordan and Eben D. Jordan, Jr., were in Boston.
Q. According to the books of Jordan, Marsh & Co. how many sellers contributed to the stock of the cloak and suit department?
A. I should say a hundred, as a mere guess; fully a hundred.
Q. Who were the principal ones?

A. Well, we will say Simonson & Weiss, Friedlander and Caspar, and afterwards A. Friedlander & Co.

Q. Schwab Brothers & Co.?

A. Yes; some, but very few entries.

Q. You say that Schwab's was one of the smallest?

A. I find perhaps a dozen entries here to him.

Q. Do you know that Jordan, Marsh & Co. paid them $60,000 for that period of time?

A. I do not remember.

Q. Do you mean to say that you had nothing at all to do with it?

A. I do not mean to say I had nothing to do with it.

Q. Didn't you know of a check being drawn to the order of G. Schwab & Co.?

A. I have heard of a rumor that a check was drawn for a very large amount.

Q. Besides the goods entered on these ledgers to Schwab & Co. or the New York Novelty Co. don't you know that the firm had paid them for a large amount of goods not entered?

A. I have heard so.

Q. Didn't you examine the books of G. Schwab & Co. or the New York Novelty Co.?

A. I did.

Q. Didn't you report the amount of goods there shown to have been sold to Jordan, Marsh & Co. in 1884 and 1885 prior to August, 1885?

A. I did.

Q. Don't you know those goods charged and claimed have
169 been paid for by Jordan, Marsh & Co.?

A. I know it by rumor. I know that case was settled.

Q. Now, tell me what there was—if in truth there was in the cloak and suit department on the 1st of February, 1885, a great deal more of stock on hand than the books show, why would it not be manifest at once from the comparison of the account of stock taken with these records in the books of weekly accounts?

A. Because the stock account had been falsified.

Q. In regard to the receipt by mail how many persons handled this mail before it was received by you?

A. Two—the boy who brought it up in a bundle and the corresponding clerk. The corresponding clerk opened the letters. It was his business to open all the letters that came by mail, except personal letters. He carried to everybody the various letters intended for them.

Q. Now, these statements that you received, four hundred a month, all came to you from the corresponding clerk?

A. They did, and I examined them, not directly, not at once, but at intervals. That I can explain at length. I put the bills according to the due date. If they were not due they went with the file of bills to be paid. If there were any duplicate bills needed I would send for them.

Q. When you got through with the examination and checking what did you do with the statements?

A. Put them with the bills. If you notice, the package of bills is filed and string tied around them. The statement is always under the first bill, if there be a statement.

170 Q. You spoke of bills being filed.

A. Folded, I mean—folded with the letter file.

Q. Folded with a letter file in your possession would be a bill filed in the office, would it not?

A. Yes, sir.

Q. And a statement to these plaintiffs by Mr. Hewes that their bills were filed in the office would mean to your mind that they were under your hand folded in file?

A. And in my possession; yes, sir.

Q. As to the bills and invoices that came into the house, was it in due course for the corresponding clerk to hand you also the bills?

A. No, sir.

Q. Whom did he hand them to?

A. He put them in a drawer.

Q. Distributed for 35 departments?

A. No; not at that time.

Q. They were by another clerk distributed?

A. Yes; taken down——

Q. So that if Mr. Hewes told Mr. Robertson from time to time that the plaintiffs' bills were on file in the office he would mean, to your mind, that they were in your hands subject to your examination?

A. It would mean to my mind that they were entered in our book, passed by Mr. Hewes, and ready to be paid by me.

Q. I understand that when you visited the office of the plaintiffs, on the 5th of September, it was with the object not only of examining their books to find out what goods they showed had been sold to Jordan, Marsh & Co., but also to see if they could show you the express receipts for them. Is that so?

A. That entered into it. I was to examine that line all I could from that date on.

171 Q. Did you find your examination satisfactory?

A. As far as we went I found it satisfactory.

Q. That is, you found that they had the express receipts to show for every article of goods which they had then claimed they had sold to Jordan, Marsh & Co.?

A. No, sir.

Q. Except those which had been sent by the Adams Express Company.

A. Not every article. I don't know whether I took the case numbers from the books or from the express receipts. My main idea was to see whether these bills were put in consecutive order in the book. Another idea of mine was to see that bills were paid in consecutive order, settled up to a certain date, which I found was not so, and this was merely incidental to that—taking it as a method of information—something to give us information which we could look up afterwards.

Q. You found it satisfactory?

A. Satisfactory as far as that went. When I went into the store I was introduced to a member of the firm and he ordered Mr. Mott to give me all I wanted. When I came out they asked me if it was all right and I said yes.

Q. Did you report to Jordan, Marsh & Co. that you had told them or Mr. Mott or a member of the firm what you now say you did as to its being all right?

A. No, sir.

Q. Why not?

A. Because my words "all right" meant it was all right as far as it went. They treated me nicely and I was much obliged to their accommodation.

Q. Did you tell Jordan, Marsh & Co. you had made investigation and found the plaintiffs had vouchers from the express
172 company to show for all the goods which they claimed?

A. I told Mess. Jordan, Marsh & Co. what I did. They asked what I examined and I told them.

Q. Did you tell them you examined the express receipts?

A. I did.

Q. Now, I want to ask you about a conversation which you had. You say you had a conversation about sending statements. You asked Mr. Mott if he had sent any statements to Jordan, Marsh & Co. Was that before or after you examined the books?

A. Just as I finished, if I remember, I said, as near as I can recollect, Have you ever sent us any statements? He said, "No, except —," as he referred to this one you have there of August 24th, 1885. That is all I recollect correctly. I think he mumbled an apology for not doing so. He said something to the effect that he considered Jordan, Marsh & Co. good, and that he didn't care to send them a statement—didn't care to bother them with that; they were perfectly good.

Q. What is the first knowledge you had that irregularities——? I want to fix the date on which the irregularities were discovered in department No. 1.

A. I can fix the date within two or three days, I think. I should say July 3rd, 1885, which I think was Saturday.

Q. Was it not in June?

A. It might have been June 30th, possibly; I cannot fix it within a week. I don't remember from whom I got the information. July
3rd is about the date, I think, at which the firm discovered
173 that Mr. Hewes had been overstocking his department.

Q. Didn't some one else take charge of that department on a certain day?

A. Not that I know of.

Q. Didn't Mr. Hewes give up the charge of that department on a certain day?

A. Not that I know of.

Q. Did Mr. Hewes remain in that department?

A. I saw him in that department for some time afterwards.

Q. Doing what he had previously done?

A. I don't know. I think I had already sent out the remittance

sheet of July 1st to the plaintiffs when I heard of this trouble—that there was something wrong with Mr. Hewes. The sending of the remittance sheet of July 9th was my own act; I consulted with nobody. I did not then know the nature of the trouble. I received the bills referred to in the remittance sheet of July 9th on the 8th of July, I should say.

Q. Have you never seen the originals, mailed by the plaintiffs or which they claim to have mailed to Jordan, Marsh & Co., of all their goods?

A. No, sir; only the ones I paid.

Q. What date was this red-letter notice invented?

A. I think it was very near the date of that remittance—August 7th. It was sent to all parties to whom we sent remittances after it was printed.

Q. Is Mr. Blath in court? Will Mr. Blath stand up?

A person in court stands up.

Q. Was this the gentleman present when you had your conversation with Mr. Mott?

A. I think it was.

Q. What did you find as identification of the package
174 number?

A. I have made out a statement of the copies of the entries in the receiving book as I found them, giving the book, page, and a copy of the entry and the numbers called for on the statement, August 24th. I find identical numbers within a day or two. There were 119 case numbers called for and I found 93 and 26 not found.

Q. The 26 not found in the receiving book, are they the 26 of which the plaintiffs show express receipts?

A. Yes, sir.

Redirect examination:

Q. I understood there was prepared weekly statements for the use of the members of the firm showing the amount of stock which the books showed to be on hand, the amount of goods which the books showed had been bought through the week, and the amount that had been sold during the week and the balance remaining on hand.

A. That is right.

Q. And that there were similar statements prepared once a month?

A. Yes, sir.

Q. In these reports made by the suit department were there not details reported from whom the purchases were made?

A. No, sir; never.

Q. Nor details—of course not—showing to whom the sales were?

A. No, sir.

Q. So it was only of quantity?

A. That is all. Those statements were made out and laid before the members of the firm in order that they might ascertain how

much stock the buyers were carrying, and they showed the same data for the corresponding period of the year previous. They
175 showed the amount of stock at the beginning of the month, and the purchases and sales in each department as taken from the books. An actual inventory, an itemized inventory, of stock was taken in the several departments half-yearly to corroborate the books.

Q. Was there kept in each department a "mark-down" book?

A. There was, in order to keep the stock correct, because if they marked down stock and did not put it on their book it affects the stock directly the same as a sale would without being reported to the cashier's desk—that is, a "mark down" unentered would be equivalent to a sale unreported. The buyer of the department determined the mark down, and then it was his duty to note that fact in the mark-down book. The amount so marked down entered into this monthly statement laid before the members of the firm. The way it could happen that the stock as actually taken semi-annually could vary in amount from the amount which the "entire book" called for as against any particular department is this: If you have in your department, say, for example, two cloaks costing $10 each marked to sell each for $25, that would make the actual stock in that department cost $20, selling for $50. Now, if we sell one of those cloaks for $10, then at the end of six months we have in our department as actual goods one cloak selling for $25, or, in other words, $25 worth of stock. According to our books, we have at the first of the month $50 worth of stock, less sales, $10, calling for $40 worth of stock. Our actual stock taken by memoranda would show that our stock should be $25, presuming that there was no mark down.
176 Now, if some charitably-disposed person gives us a sack for $15 and puts it in the department and it does not enter on our books, the balance of stock is at once restored. We have a cloak for $25 and a sack for $15, which is $40, and our books call for $40. That is one way. That is the way it was done in a good many cases. Another way is in taking stock, which is taken on our slips, and those slips handed to the head of the department, as well as to other people, for figuring. If the stock should overrun and should show that by these slips, all the buyer has to do is to pocket some of these slips and prevent them getting on our books. In that way the balance of stock could be maintained. That is what I mean by falsifying the slips.

Q. Would the entries of moneys paid for expressage show on whose goods the express money was paid?

A. No; and no account of sales was kept so as to show from what particular article in stock a particular sum of money—ten cents, half a dollar, or one dollar—came. When I say I received 400 statements, the most of them—in fact, 99 per cent.—are for bills not paid, sent for comparison with our books, so as to keep the two accounts straight—theirs and mine; but when you come to the statements of bills overdue, I receive very few of them. I made up the bills at the end of the month, found out their average date, and put that average date on a diary at the proper time, and that diary contained the

name of the house, the terms, and the amount of payment. When I speak of ascertaining the average I mean the average for the one month's bills. Each month is averaged by itself, just as
177 I did in the two remittances of July, 1885, to these plaintiffs. I took certain bills, all that I had before me at the time, and settled them in a body.

Q. What is it that makes you certain that you did not receive the statement which they claim to have furnished in April, 1885, of $24,000 and odd?

A. What makes my memory so very strong is, my attention was called in August, at the time of this statement, and I then stated that I had never received the statement from Schutz Bros. & Blath, and if I had received the statement it would have been my duty to have immediately reported such a statement to the firm or get one of the greatest blowings-up I ever had, and I know that never occurred.

Q. Was there anything special that led you to inquire of Mott in September, 1885, whether he had ever sent you a statement?

A. Right there I wanted to take the blame off of myself, and when that question was asked and answered that did it.

Q. In order to offset any discrepancy that might result from the withholding of a bill which would turn up as a liability, there would be no way to offset that, except by the stock when actually taken running over what the books called for, would there?

A. Not that I know of.

JOHN H. HEWES, called on behalf of the defendants, testified in substance that he was in charge of the cloak and suit department of Jordan, Marsh & Co. for several years. He entered their employ about ten years ago, and took charge of that department
178 about two or three years after entering their employ; that his duties were to buy stock and manage the department in a general way. He made the purchases for the department, fixed the prices and terms and the rate of discount; also had charge of the sales and employed the help. The character of the goods sold in his department were ladies' suits and cloaks. He had no connection with paying the bills. A Mr. Gardham was his first assistant during the years 1883, 1884, and 1885. He knows Mr. Julius Schutz and Mr. Blath, of the plaintiffs, very well; commenced dealing with the firm of Schutz Bros. & Blath through Mr. Robertson, the salesman, he believes, in the spring of 1884.

Q. Please state what took place between Mr. Robertson and yourself with respect to the dealings at that time, and state your first conversation.

A. I recollect Mr. Robertson came to my department; he asked me to look at his samples—spring; I did so. I think I went to the Parker House, and I thought he had a large and very good line. I told him I didn't believe I could buy any just then, because I was already carrying more stock than the firm wished I would, but that I would like the goods very well if I could get them, and told him if he would see that no statements were sent to the house nor

any dunning bills or any letters of any kind, unless they came to me personally, I might be able to buy some of them, and on that basis I did buy some of them.

Q. What did he say in answer to your first statement to him?

A. He said he would see the house, and he had no doubt but that it could be done.

Q. Did you come to an understanding on that first inter-
179 view?

A. We did. The conversation took place at my department; there was nobody present besides myself and Mr. Robertson.

Q. Did you mention any particular name of your firm of Jordan Marsh & Co.?

A. No; I said the firm. I may have said that James Jordan was continually howling at me for carrying so much stock. The conversation lasted a few moments, which was after I had looked at his samples.

Q. And can you recollect anything else that was said?

A. No, sir; there was nothing else said of any account at that time, but that was the understanding at that time.

Q. How soon after that did you see him again?

A. I don't know just how long, but not very long—two or three weeks. Perhaps he came around again with samples.

Q. Did you or did you not give him an order at that first interview?

A. My impression is that I did; how much I don't remember.

Q. Did he make any report to you in respect to his firm?

A. Yes; he told me he had spoken to them about the affair and it was all right. That statement was made at the second interview which took place in my department.

Q. Now, can you repeat just what you said in regard to your firm's wishes or opinion about the stock you carried.

A. I said I was carrying a very much larger stock than they wished me to carry, and that they were continually finding fault with me from that very fact. That was the substance of the conversation.

Q. Have you stated all you can now repeat as having transpired at that first interview?

180 A. I have. All the order I ever gave him for Schutz Bros. & Blath I either gave him in the department or at the hotel where the samples were, in Boston. I think I did buy a few goods from him in New York, but I never went into the store not more than two or three times.

Q. Did you ever have any talk with him on the subject of his firm getting money from your firm?

A. Yes, sir.

Q. Can you recollect when that was?

A. No, but it was a very long time—a very long time after these goods were bought and when the bills were overdue, and he came to me one day and told me that his firm had asked him to tell me to pass some bills and have some money sent; that they needed money, and I promised to send the money. This was more than

six months after the goods had been bought. There was nothing said on the subject how the money should be got for them. It was left to me. I was to pass the bills and get the money the best way I could and as fast as I could.

Q. What did you say to him on that subject and he to you?

A. Do you mean when he asked me for the money?

Q. Yes.

A. I told him I would pass the bills just as soon as I possibly could. I also told him I would have to have some undated bills, so that I could pass them without my firm's attention being called to any erasure of dates; that I certainly could not pass them on the old dates.

Q. What did he say to that?

A. That he would get them for me. I am on friendly terms with Mr. Robertson still.

Q. Did you ever have any conversation with him on the subject of sending invoices?

181 A. Yes; I remember telling him the invoices could come right along as usual, as I would get the invoices anyway.

Q. Then what?

A. Then the understanding was that I held them. I told him that of my own free will, that the invoices would come to me; that he could send them right along with the goods, by mail, as usual, and they would come to me anyhow. The first talk was very early in the spring of 1884. I don't recollect when. It preceded all our dealings. I then continued to deal with him down to the summer of 1885. I don't know when I passed the first bill; it was a long time after the goods were bought. During that time I saw Mr. Blath two or three times. I think I may have seen Mr. Julius Schutz. I saw him in New York. I also saw him in Boston. I saw Mr. Blath in Boston, in my department; also in the Parker House.

Q. What took place between you and Mr. Blath?

A. Mr. Blath generally came with Mr. Robertson to help him sell his goods and he always asked me if I had passed any bills yet, and if I hadn't when I could. I always told him that I would pass them in a day or two, hoping that I could, but I didn't always do it. I don't recollect the dates when I had the conversation with any of these people, but I remember the conversations. It was a long time after this thing began. I don't think Mr. Blath spoke to me more than two or three times. He spoke to me that often, I think. I remember that one time he asked me if I had passed some bills for him—especially the older ones. He said they

182 were pretty near old enough to walk, some of them. I told him I thought so too and would endeavor to pass some of them—especially the older ones. I also saw Mr. Julius Schutz in Boston one day. He came there to collect a bill; he said his brother wished me to pass some bills right away; he hoped I could that day. I promised him I would and I remember passing about $1,500 for him. Later in the day he came to me and said his brother had telegraphed him that $1 500 was not enough; he

wanted more. I promised to pass some more at the earliest moment I could.

Q. Do you remember any other conversation with him?

A. No; I had very little conversation with Mr. Julius Schutz on that subject. I remember that day, though, I told him I had passed some bills, and he wanted to know how he could fix his books. I told him I would give him the original dates and he could fix his books as he saw fit.

Q. Did you receive from them any blank-dated bills?

A. I did.

Q. When was that?

A. That day after the time that Mr. Robertson first asked me to pass some bills and said that the firm wished him to say so to me. The time I don't recollect. It was six months at least after we made the arrangement—early in the year 1885.

Q. How many blank-dated bills did you get?

A. I don't know how many. There were quite a package of them—a large number. I don't know how many. It might have been fifty or might have been less.

Q. Did you pass any of these blank-dated bills?

A. Yes, sir; I filled in some of the dates in several cases.

Q. True dates or not?

183 A. No. For instance, if I passed a bill to-day and it was a blank-dated bill I marked it to-day, although it might have been a year old actually.

Witness states that he passed all the bills referred to in the remittance sheet of July 1st, 1885, and July 9th, 1885, and they are some of the blank-dated bills he received. The dates are in his handwriting. He inserted the dates on the day he passed the bills.

Q. Explain to the jury exactly what you mean by passing the bills.

A. I mean I put the selling price on and signed my name to it to that effect, and I passed it back to the receiving clerk, Mr. Erlacher. He would have to sign his name to verify the quantity that was there. These bills bear the signature and initials of Mr. Buckley, the assistant of the receiving clerk.

Q. You fixed a certain selling price in blue pencil on those bills over a year old. Have you any way of determining whether that price was the price actually marked on those goods for sale or whether it was a mere arbitrary figure put on those bills.

A. In many cases I marked them exactly as the original bills were marked, but latterly I did not. I wanted to make it show all right, anyway.

Q. 12 or 14 months after the goods had been received and sold out what method had you of determining what was the selling price actually or originally marked on those goods?

A. Nothing but memory.

Q. Did you or did you not follow your memory in fixing on those old bills a selling price?

184 A. Yes, sir; as a rule, I did so. I think I did so in this instance. I don't know whether the goods referred to in those bills were in stock at that time or not. The blank-dated bills were sent to me from Schutz Bros. & Blath. At any rate, I received them by mail after telling Mr. Robertson I wanted them. They were addressed to me. The bills settled by Jordan, Marsh & Co. on July 9th, 1885, in evidence, and also some of the blank-dated invoices received from the plaintiffs, the dates at the head of the bills are mine, and I put these dates — at the time I passed the bills. I cannot tell whether these goods were in stock in July, 1885. I cannot tell whether I ever passed any other undated or falsely dated bills for these plaintiffs. If we paid any, I did, I presume. My impression is that I don't think I did, because we paid them very little money through that whole time. I cannot be clear because I had plenty of other firms in the same business, and I cannot remember. In the ordinary course of business, as it was done at Jordan, Marsh & Co., after the invoices were received at the main office and opened they were sent to the receiving-room, which was presided over by Mr. Erlacher. They then went into the different boxes. I got the bills from the receiving-room. I got the bills from the receiving-room out of the box marked No. 1. The invoices of Schutz Bros. & Blath that were received by me in that receiving-room out of the box I took out and took them to my department and put them in the desk. What I should have done was to pass each bill to Erlacher and have him count the goods and let me have them, and pass the bill right there. I should have compared it with my memorandum book, of course, to see that the number
185 and prices corresponded, to see if everything agreed as I bought them, and if I found it correct, to O K the bill. Then I was to pass it back to Mr. Erlacher or his assistant, and have the goods counted, and then it was to be sent forward to the one who kept the entire book, where it would be for the first time charged against my department. It had to go there before it could get onto our stock and before it would get on the books of the firm.

The witness is handed some bills of the plaintiffs, dated August, 1884, which he says were for goods for his department, but that the bills were not blank-dated bills, but were passed by his assistant, Mr. Gardham, who was in charge of that department in witness' absence in Europe, and also two settled for on the 6th of December, 1884—one passed by him, the other by Mrs. Banks, in his department, who had charge of the wrappers and dressing sacques. She bought the wrappers and she passed the bill. They were both dated Nov. 22, 1886. All of which bills he says were correct, and they were passed before he had the blank-dated invoices.

Q. In any case would you get the goods out of the receiving-room before Mr. Erlacher had examined them?

A. I did get them. Oftentimes I took my own men from the department and took them up from the receiving-room. After they were O K'd by me they didn't ask much about them. They O K'd them and passed them, and only asked me if I received the goods.

I got the goods from the receiving-room without Mr. Erlacher having any bills to O K. I took them when he was very busy on something else. I took my own men from down-stairs and said nothing
186 to him about it whatever. I continued doing that for a period of two years, more or less. I have no means of ascertaining how many goods came to that department from these plaintiffs.

Q. Did you ever surrender invoices that you may have received from Schutz Bros. & Blath to Jordan, Marsh & Co., except those that were O K'd and paid?

A. I never gave them any invoices except they were O K'd and paid.

Q. What did you do with the others that you received from Schutz Bros. & Blath? I don't mean the undated ones. I mean the originals.

A. As fast as I passed any of the undated bills I destroyed the originals, and the others remained on my hands at the time this disclosure came about. I retained them, and finally, I presume, they were destroyed among a lot of other papers that I had.

Q. Why did you not deliver them to Jordan, Marsh & Co.?

A. I kept them for a long time, and I thought perhaps something might come up that I could see that Schutz Bros. & Blath got their money on these bills. I did not give them up at the time of this disclosure. I cannot tell how many bills I had on hand. There were a large number.

Q. During the 18 months or thereabouts you continued selling to Mr. Robertson did you receive any statements from Schutz Bros. & Blath?

A. I did. I can remember three. One from Mr. Robertson; Mr. Blath also brought me one, and one, if I remember rightly, was sent to me by mail, addressed to me personally, to the care of Jor-
187 dan, Marsh & Co. I kept them for awhile to guide me in checking bills if I got a chance to pay them. Finally I must have destroyed them. I did destroy them with my other papers. I never delivered or showed them to the firm of Jordan, Marsh & Co. or any member of that firm or any one in its employ. No one but myself ever saw these statements after they got in my hands. Mr. Blath gave me one of these statements in Jordan, Marsh & Co.'s store. He told me that was one of the bills he would like to have paid. It was a large amount. I don't remember exactly. It was 15 or $20,000. I don't know the exact amount. Mr. Robertson gave me one in my department at Jordan, Marsh & Co.

Q. How did they come to send you one by mail?

A. I think at the time they wrote me a letter and asked me to hurry up and pay these bills, because they were very old. I have not got the letter. I never kept any communications from any of these firms. I never heard from Mr. Robertson or either of the plaintiffs that any statement had been sent in my absence until I heard it here in court. I never knew of it. Upon the reception of the goods of plaintiffs in my department they had the ticket of Schutz Bros. & Blath on them. After the goods went into my department

they were removed and our own ticket put on—Jordan, Marsh & Co. These tickets were put on before they went into the stock for sale. I could tell any one's goods by picking them out.

Q. You could tell from your familiarity with their particular goods?

A. Yes, sir; I don't suppose any one could tell but myself.

188 Q. Were the goods of Schutz Bros. & Blath of the same general character and of the same general description?

A. They were to most people.

Q. As well as goods you got from other houses?

A. Certainly; they consisted of ladies' cloaks and suits. I was obtaining ladies' cloaks and suits from other houses, perhaps a dozen. The tickets on the goods were both for the cost and the selling price. I determined the selling price. There was kept in that department a mark-down book, and I had authority to mark the goods down.

Q. What was your duty with respect to entering the amount of such mark-downs in the mark-down book?

A. My duty was to enter it in every case where I marked down anything.

Q. Then what was your duty with respect to making a report of the mark-downs thus entered in the mark-down book?

A. No report. The book-keeper who kept the entire book took it from the mark-down book and would give my department credit for those mark-downs.

Q. Did you or did you not cause the goods to be marked down during that period of two years or two years and a half?

Objected to; objection overruled; exception by plaintiffs.

A. I did.

Q. To what extent did you omit entries of mark-downs?

A. To a large extent. At least two-thirds of the mark-downs were not recorded in the mark-down book.

189 Q. How often was an account of stock taken in that department?

A. Every six months, under my supervision. It was taken on slips of paper by various people that were detailed. All those slips came to me, and I saw that they went onto the book provided for the entry of those amounts of stock.

Q. Did you or did you not enter on that book all those amounts of stock?

Objected to by plaintiffs; objection overruled, and exception noted by plaintiffs.

A. I did suppress many of them.

Q. You have stated that you had made a second statement to Mr. Robertson in regard to the firm being opposed to your carrying so much stock in that department.

A. Yes, sir.

Q. What had taken place between the firm and yourself on that subject?

Objected to; objection overruled; exception.

A. There was a protestation on their part all the time about the stock I carried; every Saturday particularly. Mr. James Jordan called me in the office and warned me about increasing my stock, but nevertheless I did. I also talked with Mr. Eben D. Jordan. These conversations covered sometimes about a half an hour, and occurred every week, at which time the weekly and monthly statements of the stock on hand as per the books were before them.

Q. Did you ever have any conversation with Mr. Blath personally on that subject of the firm's unwillingness for you to carry more stock?

A. I don't remember any conversation that I had with him
190 on that subject.

Q. You only recall the one with Mr. Robertson?

A. Yes, sir; we could not tell by the sales of the goods whether the money was received from Schutz Bros. & Blath's goods or from anybody else, and I don't believe that any one but myself could tell whether I had on hand at any time more goods in that department than the books indicated; they could only tell by guess and by the looks of the stock, but hardly that. I don't think they could tell that way; the stock was kept on the counters and underneath the counters in closed boxes and upstairs in various places.

Q. Inquiry has been made as to the persons from whom Jordan, Marsh & Co. made its largest purchases for your department, and the name of Friedlander & Co. was mentioned. Did you handle many goods coming from that firm?

Objected to as immaterial.

Mr. MYERS: They went into that yesterday, I assume, for a purpose. I think I may attempt to defeat that purpose by showing the whole proof on that point.

The COURT: You may inquire if they treated him in the same way merely to meet the fact that there was this other quantity of goods there; we don't want to try any case but this one now.

Mr. CHOATE: I submit that it has nothing to do with the issue here. It is not the subject of a trial of a suit to introduce all possible evidence that counsel upon one side think may be useful to meet all possible arguments that counsel on the other side may make.

The COURT: I understood you to inquire of Mr. Bassett as
191 to there being other goods in quite a large quantity which came into the store of the defendants in substantially the same way; that would have some tendency to show that there were so many goods that the defendants must have noticed it or ought to have noticed that more goods were coming in than they had bought and paid for. Now, I think it proper for them to meet that by showing that these other goods were kept away from the knowledge of the defendants. As that was done without any objection I think it proper for them to meet it in that way; for that purpose the question may be asked.

Exception taken.

A. Yes, sir; I've handled a great many goods both from Friedlander & Caspar and from A. Friedlander & Co.

Q. Did you or did you not keep the defendants from knowing of the reception of these goods?

Objected to. Pl'ffs except.

The COURT: He may answer that.

Mr. CHOATE: The question is whether in the trial of this case they can be permitted to attempt to prove a case against Mr. Friedlander. I know there are cases where the object being to prove that a certain party has committed one fraud, you can prove that he has committed others of the same kind at the same time. Surely, however, that is not admissible against us to show that he made arrangements with Friedlander for the purpose or with the object or the direction of showing or confirming his alleged case against us.

The COURT: I meant strictly to exclude the precise thing which you mentioned—that is, everything that occurred with Friedlander—simply permitting counsel to inquire whether these goods were brought to the knowledge of the defendants for the purpose of meeting the fact which you brought up, namely, that the goods went into the store; we keep the Friedlander case out, but still he may explain the presence of the goods.

192

A. I did.

Q. How was it as to goods acquired from Simonson & Weiss?

Objected to on same grounds as before.

The COURT: I don't remember that name was mentioned.

Mr. MYERS: It was the one uppermost in my friend's mind, and he mentioned it yesterday.

The COURT: If that name was mentioned you may ask the question.

Exception taken by plaintiffs.

Q. Did you or did you not keep the defendants from knowing of the reception of those goods?

A. I did.

The COURT: I only intend to admit those that were actually mentioned.

Q. Is the same true as to the New York Novelty Company?

A. Yes.

Q. And the Goldman Bros.?

A. The same.

Q. And A. Friedlander and Friedlander & Caspar?

A. Yes, sir; I have handled a great many goods from Friedlander & Caspar.

Q. Did you or did you not keep the defendants from knowing of the reception of these goods?

Objected to by plaintiffs; objection overruled, and plaintiffs except.

193 A. I did.

Q. How was it with goods received from Simonson & Wise? Did you or did you not keep the defendants from knowing of these goods?

Objected to; objection overruled; plaintiffs except.

A. I did.

Q. Did you tell Mr. Robertson ever that the bills were on file at the office?

A. No, sir.

Q. Did you tell him you would pass these bills as soon as you could?

A. I did. I think I told him where they were; I told him they were in my desk.

Q. Did you have any conversation with either of these plaintiffs as to whether others were in this matter with you before the disclosure?

A. I think I did tell Mr. Blath there were others in it. The first conversation that I had with either of defendants or any one in their behalf with respect to the deceitful manner in which I had conducted that department was on July 3rd, 1885.

Q. When was it you first confessed to the defendants that there was any concealment as to Schutz Bros. & Blath?

A. I did not confess then at all until after they had the statement from Schutz Bros. & Blath, which was a long time after the disclosure at first.

Q. What statement do you mean; August 24th?

A. The one that was sent to Jordan, Marsh & Co. after they had sent a remittance sheet to Schutz Bros. & Blath, in August, 1885.

194 Q. I hand you remittance sheet of August 7th, containing the red-letter notice marked Defendants' Exhibit "A." Do you remember Mr. Blath coming to Boston with that document?

A. Yes, sir.

Q. What took place?

A. He came to my house; he had the remittance sheet with him at the time; it was between the 10th and 25th of August. He was there the best part of the day. He reached there a little after ten o'clock, and he remained until at least four o'clock in the afternoon; during all that time we talked about this disclosure.

Q. What did he say to you?

A. Mr. Blath asked me if I had passed his bills in. I said no. He asked me why not, and I said I was trying in some way to save him. He asked me how I intended to do it; I told him I didn't know just then. He then produced this remittance sheet, and said that if he signed this he would have to sign away $30,000, more or less. I saw then it was no use to try any longer to save him, as I intended at first. We finally agreed that he should go home and send a statement in, but I have never given Jordan, Marsh & Co. any of the bills. We were together five or six hours that day, but I do not re-

member the rest of that conversation. It was not of particular importance.

Q. What was the import of it?

A. Mr. Blath asked me why I had not placed his bills in the hands of the firm. I told him that I had hoped for a chance to save him in some way if I could. I didn't like to put their bills in. I didn't know but something might happen that I could save him his money. When I saw this I saw there was no way out but to send a statement in.

195 Q. Was anything said on the subject of statements having been theretofore sent?

A. No.

Q. Did he tell you where he had got that remittance sheet?

A. He said it was sent to him with the payment of the bill of that amount from the firm of Jordan, Marsh & Co. He said he did not acknowledge it because he did not want to sign away the claim he had. He gave no other reason.

Q. Between July and August did you have any conversation with Mr. Jordan in regard to Schutz Bros. & Blath?

A. I did.

Q. Did you ever in any way, directly or indirectly, until after the 24th of August, 1885, let the defendants or either of them know anything about any of these bills of Schutz Bros. & Blath asserted in this suit?

A. I did not.

Cross-examination by plaintiffs' counsel:

Witness states he resides in Kansas City at present; came from there about a week ago. He went to Kansas City just before Christmas of last year, 1886. Up to that time he was in the employ of Jordan, Marsh & Co.

Q. In whose employ are you now?

A. I am in business for myself, and Mr. Eben D. Jordan is my partner; he is my partner in the hotel business. The firm name is John H. Hewes. Mr. Jordan is not known in it directly, but he is, nevertheless, a partner as far as the profits and losses are concerned. There is an agreement between me and Mr. Jordan that I should pay Mr. Jordan half of the profits, and also I should pay him within a certain length of time the money that I borrowed

196 from him, $25,000. He contributed $25,000, and he is to get back the money and half the profits. This is the only business arrangement I have with Mr. Jordan. He put in $25,000 in a certified check for that amount, which he gave me. There has been no trouble between me and Mr. Jordan since July, 1885.

Q. Did he give you that $25,000 as a punishment for the fraud you had attempted to commit on his firm?

A. No, sir.

Q. As a reward?

A. No, sir. I don't think that he gave it to me under any circumstances; he loaned it to me.

Q. Did he ever tell you that he thought you had tried to defraud him?

A. No, sir. He said he was very sorry I did——

Q. What?

A. Betray his confidence.

Q. Was that at the time he put in this $25,000?

A. No; long before that—when this disclosure first came about.

Q. It was after he ascertained the full facts that he let you have the money?

A. It was a year after that that he let me have it.

Q. Did he make any explanation why he did it?

A. I had a talk with him just after I supposed the case in which I gave evidence was finished in Boston; also in Mr. Myers' office. I wanted to do something, and Mr. Jordan told me one day I had better go West; there is nothing here for you.

Q. What explanation did he give you of taking you in as a partner and putting in $25,000?

197 A. He sent me out there to find out if I could do anything for myself; he said he thought I had suffered a great deal over this thing and had been hurt.

Q. He thought you had been the sufferer?

A. Not that I had been the sufferer, but that I had suffered enough. I went out and reported various projects that he did not think well of until I found this hotel. Up to that time I had been virtually in his employ.

Q. What was the rate of compensation after what you call the disclosure was made, in July, 1885—a salary?

A. Yes, sir.

Q. What salary?

A. $2,000.

Q. Did they advance your salary after that?

A. No, sir.

Q. Did they diminish it?

A. No, sir.

Q. Did they continue to pay the same salary down to Christmas, 1886?

A. I was not getting any stated salary paid. I was in New York a great deal, and of course they paid my expenses.

Q. Did it come to $2,000 a year besides your expenses?

A. I don't know. I didn't take account of it.

Q. You didn't notice any change?

A. No, sir.

Q. What were you doing for them?

A. Anything that Stern & Myers or Brooks & Nicholls wanted to find out. I gave a great deal of time working up this case and the other cases. Since Christmas I have paid over to Mr. Jordan

198 on account of his share of the profits $5,000, but nothing on account of his $25,000. He gets that $25,000 or the place in two years if I do not pay him. It is a fair sized hotel in Kansas City. I paid $25,000 on it. The purchase price was $45,000. The

business still continues. Since August, 1885, neither Mr. Jordan or his partners have made any claim on me for damages.

Q. Did he tell you when he let you have this $25,000 that he could afford to do it if he could save himself from paying the plaintiffs for their goods?

A. No, sir; there was no talk made of the plaintiffs or anything else except this business of ours. They commenced no criminal or civil proceedings against me. He told me that I had caused him an injury. He has always told me that. Between July, 1885, and Christmas, 1886, my residence was in Boston, in the same house where Mr. Blath visited me. I boarded there. I am not married. I don't think I have been in the defendants' store since August, 1885, except I went in there one night to identify something. I think it was in the evening. I don't remember what it was.

Q. Where have you seen them?

A. I have seen Mr. Jordan at Brooks' office. Mr. Brooks was his lawyer in Boston.

Q. How often have you met him there?

A. Not over three times, I don't think. Mr. Marsh I never saw at all.

Q. And the young Messrs. Jordan?

A. I only met James Jordan once on the street. I think he refused to speak to me.

Q. Before the $25,000 was paid by Mr. Jordan had you
199 already testified in the case?

A. This is the only time I have appeared before a court.

Q. Don't you remember that when that $25,000 was advanced there was then coming on for trial in Boston one of the cases?

A. I had heard some rumor—yes, sir.

Q. Didn't you know that in that very month of December a jury was impanelled to try one of these cases?

A. Yes, sir. I was summoned as a witness. The $25,000 was paid to me after that. I don't recollect the time I was called for that trial, but it was shortly after that.

Q. Was not the $25,000 paid to you within a week of that time?

A. I don't recollect the time, whenever it was.

Q. Was it not within three days of that time?

A. I cannot recollect that either.

Q. Was it not, in fact, paid you on the very day you were summoned to attend that trial in Boston?

A. No, sir; I think it was paid two or three days after the disposition of the case. That case was settled in Boston, I understood, and that money was paid to me two or three days after that—maybe nine. I don't recollect the day I got the $25,000. On the third day of July, when I made the first disclosure to Jordan, Marsh & Co., I was in full control of my department.

Q. On the 3rd of July, 1885, was there in your department any of those goods which the plaintiffs now sue for?

A. Do you mean Schutz Bros. & Blath's goods?

Q. Yes.

A. I think there were some.

Q. How many?

200 A. That I could not tell you.

Q. What is your best judgment?

A. I could not approximate it.

Q. Were there, on the 25th of August, any of the goods still remaining in your department?

A. I was not there. I was not in the house at that time.

Q. I understood you to say on your direct examination that you could always tell, upon examination, whose goods were in the department?

A. Yes, sir.

Q. Plaintiffs' goods were so distinct in character from the others that you could, on examination, tell?

A. Yes.

Q. So that either on the 3rd of July or the 25th of August you, by examination, could have set aside and identified every piece of goods coming from the plaintiffs that were still there?

A. I think I could in the majority of cases.

Q. Substantially you could?

A. Substantially I could.

Q. Did the defendants ever ask you to do that?

A. No, sir; not particularly Schutz Bros. & Blath.

Q. Did they ask you to make an examination and identify from what source the goods came into that department?

A. I did so one night.

Q. What night was it?

A. I don't recollect. Some time just after the trouble.

Q. Was it in July or August?

A. I am rather inclined to think it was in August. I am not sure.

201 Q. Did you make a report to Jordan, Marsh & Co.?

A. No, sir. I laid the goods out on the floor as fast as I came to them.

Q. And indicated whose they were?

A. Yes, sir. I indicated them to the best of my judgment and memory. I did not label them.

Q. You indicated that these goods came from the plaintiffs and others from Friedlander, and another lot from Simonson & Wise, and so on?

A. Exactly; yes.

Q. Is it not in your judgment that you so selected and set apart all those goods that came from the plaintiffs?

A. Not all. I could not recognise all.

Q. But substantially?

A. In large part; yes.

Q. Do you know of any effort or attempt having been made by the defendants to return those goods to the plaintiffs?

A. I never heard anything more about it since that night.

Q. The goods were not left with you?

A. No.

Q. Jordan, Marsh & Co. did not allow you to take any of the goods?

A. No, sir.

Q. They never claimed that they were your goods?

A. No, sir.

Q. That they had been sold to you?

A. No.

Q. Or that you had taken them off their hands?

A. No, sir.

Q. Or that you ought to take them?

A. No, sir.

Q. Did you ever have any conversation with Jordan, Marsh & Co. about the propriety of returning to the plaintiffs the proceeds
202 of the rest of plaintiffs' goods which they had received and sold?

A. No, sir.

Q. Or they to you?

A. Never.

Q. Did they ever claim in any way that you had bought the goods and not they?

A. Not to me.

Q. Never made any such intimation to you?

A. No, sir.

Q. You have stated that in the course of business when goods came ordinarily you made a written memorandum of it?

A. Yes, sir.

Q. At the same time the plaintiffs' buyer made a written memorandum?

A. Both the buyer and the seller.

Q. You were in the habit of looking at them?

A. Yes, sir.

Q. Their seller and you as the representative of Jordan, Marsh & Co.?

A. Yes, sir. I looked at them to see if they corresponded before we parted generally. It took about three weeks after the order was given before the goods came. When they had them on hand they came right away, in two or three days. I always preserved my memorandums in a book. I have not the least idea where those books are. I don't recollect where they last were to my knowledge.

Q. Have you any recollection of any case where the goods that came failed to comply with the order?

A. I have not now.

Q. And you have not at any time?

A. I don't recollect of it.

Q. Don't you know in substance that all the goods you ordered came?

A. I don't know that.

203 Q. Can you refer to or suggest any that did not come?

A. No, sir.

Q. Did you miss any from the goods ordered?

A. I did not miss them, because I did not keep track of them.

Q. Can you say the goods did not come into your possession in the store of Jordan, Marsh & Co.?

A. No; I cannot say that.

Q. Can you say that any single piece of goods sued for did not come into your possession in the suit department of Jordan, Marsh & Co.?

A. No, sir; I cannot say that.

Q. Now, all that did come and all that being received by you in that suit department, was not there, on the day when you made the examination and set aside the heap of goods, goods remaining of their—all the rest that came, didn't you sell them?

A. All besides those that I laid out, do you mean?

Q. Yes.

A. I presume so.

Q. Did you sell for account of Jordan, Marsh & Co.?

A. Of course.

Q. Didn't you turn in the proceeds to Jordan, Marsh & Co. in every instance?

A. Yes, sir.

Q. Did you keep a dollar or a penny of the money yourself?

A. No, sir.

Q. Did you ever take any of the goods out of the store for any purpose?

A. No, sir.

Q. Did you ever, in respect to Jordan, Marsh & Co., in any
204 manner defraud or deprive them of one particle of these goods or one dollar of the proceeds of the sales?

A. No, sir; except in the marking down. I had charge of my department for 7 or 8 years. I had during that period exclusive charge.

Q. And during those seven or eight years you ran it according to your judgment?

A. No; I cannot say that; I cannot say I did.

Q. You cannot say you conducted it according to your judgment?

A. No; if I had not been mixed up latterly I should have done better; my judgment was better than that. I determined what goods were bought and the terms of every purchase and sale.

Q. Now, I want you, as near as you can, to say when you were first told by Mr. Jordan or Mr. Marsh that you were overstocking that department

A. It was always the cry that I was carrying too much stock, especially during the last five years. That was so from the beginning of my conduct of my department, and it was expressed in the same way by the members of the firm. It was a general complaint that I was overstocking it. I instituted no change when I took charge of that department from what had been done before. I increased the amount of the purchases; I don't recollect how much. I increased the sales of the department. I did not double the amount
205 until a year or two—about 1880. I carried a very much larger stock from 1882 until the time I left these. In 1882 and 1883 the books were correct of the stock on hand. I

cannot fix the month in 1884 when I first had my talk with Mr. Robertson on the subject of overstocking the business.

Q. Now, tell me of any protest or form of protest that Mr. Jordan ever, before February, 1884, made to you about overstocking.

A. I cannot tell the words; the substance was always, "You are carrying too much stock; keep your stock down."

Q. Don't you know that that was Mr. Jordan's custom in every department in the store?

A. That was his rule. His instructions were to keep my stock down all the time. He did not tell me not to buy any particular kind of goods. He didn't advise me not to buy of the plaintiffs. He did not put any restrictions upon me as to the amount of goods I was to buy from the plaintiffs.

Q. Did either of the firm put any restrictions upon you as to the amount of goods which you were to buy from plaintiffs?

A. No, sir.

Q. Nor as to the price, terms, or kind of goods you were to buy from the plaintiffs?

A. No, sir; I had general charge of the whole department.

Q. And everything that you bought from the plaintiffs you bought in the name of Jordan, Marsh & Co.?

A. Of course.

Q. And for their benefit?

A. Yes, sir.

Q. And there was never any talk or intimation that any one else was to be the purchaser?

A. No, sir.

206 Q. Or that you were to be the purchaser?

A. I was to be the purchaser.

Q. I mean to say as distinguished from Jordan, Marsh & Co.?

A. I don't understand.

Q. Was it not the understanding between you and the plaintiffs that you were purchasing for Jordan, Marsh & Co.?

A. Yes, sir.

Q. In every instance?

A. Yes.

Q. And not you personally?

A. Yes, sir.

Q. There was no idea of you personally being the purchaser of the goods or assuming to pay for them?

A. No, sir.

Q. All your acts were for Jordan, Marsh & Co. and intended by you for their benefit?

A. Yes, sir.

Q. Did you ever say anything to Jordan, Marsh & Co. or they to you or any member of that firm or they to you or you to them that indicated that any one of the goods in their store were not bought and paid for their account?

A. No, sir; all the memorandums that I entered in my book of orders were under the head of Schutz Bros. & Blath, Friedlander &

Co., or whatever it might be; and in the order book Mr. Robertson had the orders were under the head of Jordan, Marsh & Co.

Q. Were not all the invoices that came through by mail and that you got possession of in the name of Jordan, Marsh & Co.?

A. Yes, sir.

Q. There was never a dime's worth of goods in your name?

A. No, sir.

Q. So that, so far as I understand you, never a word passed between you and the plaintiffs indicating that anybody but Jordan, Marsh & Co. was the purchaser?

207 A. No, sir. By the terms of the articles of copartnership between myself and Mr. Jordan he was to have the interest on his $25,000 at the rate of 10%, besides half the profits. I gave up the charge of the suit department some time in August. I was not discharged nor did the defendants propose to discharge me, but I anticipated it, so I resigned; nevertheless, my employment with them continued on the same terms, and for 18 months I devoted my time to them on this and other cases, both in New York and Boston, whenever I was called on. I paid all my bills out of what the defendants allowed me. Some time at the end of the month if I wanted money I drew it, but never in excess of the amount I had been receiving in the department besides my expenses.

Q. Is it true that until the day you voluntarily resigned you continued in charge of that department as you had theretofore been?

A. I bought no goods. I had nothing to say about that department except possibly to pass on some goods that came in that I bought previously to this thing coming out. I made no sales nor purchases from the 3rd of July. I spent some of my time in the department. Mr. Gardham took my place as head of the department. While I was there at the head of the department I was also the foreign buyer, as well as at home. The foreign buyer now is Miss Plumley, who was a saleslady in my department when I was there. I am engaged to be married to her.

Q. Tell me the earliest day when there was trouble; that you knew there was trouble about what you had been doing?

208 A. If you will be a little more definite—what do you mean? I was always in trouble.

Q. How did you know that persons from whom you made purchases, which you had concealed, were making it known to Mr. Jordan or the firm?

A. I never heard they made it known to Mr. Jordan.

Q. You heard something before the 3rd of July?

A. I heard that there was a rumor in New York to that effect—perhaps two or three weeks. I cannot say that it was as early as the 20th of June. I have no recollection as to dates. It was rumored that Jordan, Marsh & Co. were not paying their bills.

Q. Did you not know that Mr. Schwab drew on Jordan, Marsh & Co. on June 26th for the amount of his account?

A. No, sir; I did not know that. I never knew that he drew on them for a part of it. I believe that he had written sending his account; he wrote for money—for about $10,000, I think.

Q. That was for $10,000 on account of bills which you claim to have concealed from your employer?

A. Yes, sir.

Q. Wasn't that letter of Schwab written to your firm?

A. I think so, but it came into the hands of one of the employees and sent to me. I don't think the firm knew anything about it.

Q. When first did the firm know anything about it?

A. I do not know. Mr. Marsh called me into his office on the third of July and told me. The employee who received that letter asking for money and brought it to me was Mr. Bassett, I
209 think. I won't be positive. He asked me what it meant. I told him to leave the statement with me and the letter and I would look it up; that there was probably some mistake about it. The letters to the firm asking for money did not in the ordinary course of business come to me, and I don't know how Mr. Bassett got possession of such a letter. From the 20th of June until the 3rd of July I was left in charge of that department, and I think I made purchases from these plaintiffs during that period.

Q. This remittance on the 9th of July by the firm to the plaintiffs was made after you had been relieved from the duty and power of making sales and purchases?

A. Yes, sir; but I was not to leave; they did not tell me not to buy any more goods, but I didn't on my own hook. The bill that I passed on the 9th of July, if there was such a one, it was for goods previously purchased. No one else knew anything about them but me. The sheet, Exhibit C, July 9th, was made up from the bill that I handed in, but I did not make any purchases after July 3rd, but the department went on selling. I was in the department, as usual, but I didn't direct any sales. Mr. Marsh asked me about this letter of Schwab asking for $10,000: he asked me about the statement that was sent; what there was about it, what it meant, and why I had not put the bills in and where they were, and I told him, and after that I handed in the bills, which have been marked as Exhibits C C to I I. They bear dates then as they do now of purchases alleged to have been made from July 3rd to July 7th; then they went on the stock books, and this remittance sheet
210 was made in the cashier's office by Mr. Bassett.

Q. Then I understand you that you represented on receiving the statement to the official who kept the entire book that those were purchases you made on the 3rd, 6th, and 7th July?

A. I never made any such representations; I simply handed in the bills.

Q. Did they bear on the face those dates?

A. Yes, sir.

Q. Didn't you intend it as a representation that you had made those purchases on the 3rd, 6th, and 7th of July, as the bills bear dates?

A. Presumably.

Q. It was more than two weeks after you had got the letter from Schwab asking for money?

A. Yes, sir.

Q. And it was four days after you had your interview with Mr. Marsh?

A. Yes, sir. Mr. Jordan asked me before the 24th of August if I heard that Schutz Bros. & Blath claimed $30,000, and wanted to know if we owed it to them. That was before the 24th of August, long before they claimed to have sent that statement. It was much later than July 3rd, 1885. I do not think it was in July, but it was previous to the red-letter remittance sheet of August 7th, but I cannot tell how long previous. When he asked me if we owed them $32,000 I said no. I said I did not think there was any such account at all. I said that to see if I could not shield Schutz Bros. & Blath and see if the money could not be had later.

Q. Meaning to lie about it?

A. Yes, sir; I did lie about it.

211 Q. How long prior to that was it that you had seen either of the Schutzes or Blath?

A. I don't know that I saw them until after that date.

Q. Then it was not at their request that you lied to Mr. Jordan?

A. No, sir.

Q. Nobody asked you to do that?

A. No, sir.

Q. After that date no member of the firm asked you any question about the plaintiffs' account?

A. No, sir; never.

Q. If it is convenient I would like to have you tell what other lies you told Mr. Jordan in reference to the plaintiffs.

A. If you will ask me what you want to know I will tell you.

Q. You tell. I am not particular which.

A. I shall not answer that.

Q. Is it because you cannot?

A. It is because I do not remember anything about it unless you point out something you want to know.

Q. My question is of any willful falsehood that you told Mr. Jordan in connection with the plaintiffs' case or claim, to tell them to the jury.

A. Anything you want to know I will try and tell them.

Q. I do not happen to know, and you do. I want you to tell the jury and make a clean breast of it.

A. I have no clean breast to make.

Q. Didn't you tell them any other falsehoods about the plaintiffs?

A. What do you want to know?

Q. Anything that is lying in your mind concealed.

212 A. I may have told them a lot of things that I don't remember. Anything you want to ask me I will tell you. We don't want to suppress anything. The first conversation I had with Robertson was early in 1884, in the spring. It was the beginning then of the business with the plaintiffs.

Q. I would like to have you tell the jury what was the limit that Mr. Jordan put upon you as to the purchases for your department.

A. There was never any limit.

Q. You had unlimited authority to buy?

A. Perhaps not so broad as that. I was instructed all the time to keep my stock down.

Q. You had authority to buy without any limit as to quantity or from whom you could buy?

A. I never had any limit as regards figures.

Q. And there never was a time when you were not at liberty to buy from any person any lot of goods?

A. There was many a time when I was not at liberty if the firm knew I was going to buy.

Q. I am asking you as to the limit put upon you. There has been no limit?

A. No, sir.

Q. There was never a time when from any limit you were not free to buy from anybody any lot of goods at any price?

A. I never had any limit placed upon me.

Q. That complaint about your carrying too much stock was habitual?

A. Very frequent.

Q. From 1882 down?

A. Very frequent.

Q. Did you understand from anything Mr. Jordan said
213 that you were to stop buying?

A. Yes; he has told me at times to stop buying and to reduce the stock.

Q. Fix the year when he told you to stop buying.

A. I would not attempt to do that. It may have been in 1883 or 1884.

Q. You can't say that it was in 1884 or 1885?

A. No, sir.

Q. I see in June the stock had increased from $48,000, according to the books, to $83,000. Do you mean to say that in view of that it was overstocked in February, 1884, when you had that conversation with Robertson?

A. From February, 1884, we did a very large business. Mr. Jordan may not have said anything about it in June. I do not remember.

Q. I see that it was increased from February at $48,000, as shown by the books and bills, until September to $103,000. Do you mean to say, in view of that, that it was overstocked in February?

A. I don't say anything about February.

Q. I am asking you, those being the facts and disclosures to the firm, that the stock on hand had gone up from $48,000 in February to $83,000 in September, do you mean to say that the department was overstocked in February at $48,000?

A. It may have been according to the sales.

Q. The whole thing depends on the sales, doesn't it?

A. Yes, sir.

Q. And you were to use your own judgment, according to the sales, in buying?

214 A. Well, pretty much.

Q. Then it was not true in February that anybody pretended that in carrying $48,000 you were overstocked?

A. I don't know that they pretended anything at the time.

Q. You have no recollection on that subject?

A. None about the February stock. I told Robertson in February, 1884, that I could not buy goods, as the firm were complaining that the department was overstocked.

Q. Have you any recollection that it was true that the firm or anybody in the firm were complaining that the department was overstocked?

A. Not any special date. I know they were always doing it as far as I was concerned.

Q. I observe from February, 1884, as compared with February, 1885, as shown by the books and known to the firm, the advance was in February, 1884, $48,000; in February, 1885, $94,000. Do you mean to say in view of that that it was overstocked in February, 1884, at $48,000?

A. It may have been for that time. I don't recollect.

Q. Did any one in your concern pretend it was?

A. I don't remember that—not just that February. I told Robertson that the house thought it was overstocked.

Q. Who on the part of the house thought, in February, 1884, at $48,000 it was overstocked or told you that they thought so?

A. Mr. James Jordan thought so, if any one. I think he did, but I cannot swear to it. He was at me every month.

215 Q. Now, look at the account and tell me whether the condition of the department at that time, February, 1884, was not less by tens of thousands than it ever was at any later day.

A. Yes, sir; according to that sheet.

Q. Don't you know that the stock on hand increased, as shown by the books, from February at $48,000 to Sept. at $108,000?

A. We were selling more goods.

Q. Did James Jordan tell you that that was contrary to what he told you?

A. Yes, sir.

Q. And it did not amount to anything; it was a chronic way he had of growling?

A. I don't know about that. It was his custom to look at the stock every month in the different departments. Every month from the beginning to the end from 1882 to 1886 he told me my department was overstocked. It was not only every month, but through the week sometimes and continuously. Mr. Marsh did not come into my department once a month. Mr. Eben D. Jordan I probably saw every day.

Q. Where are the other Jordans?

A. Mr. James Jordan is in Europe; Mr. Eben D. Jordan, Jr., I presume, is in Boston. Mr. Eben D. Jordan passed through the departments two or three times a day. He was looking around, sometimes talking with the employees. It was a habit of his, I think, to go through every department. He never examined the goods that

I know of. Some of the goods were spread out on the counters and some of them were in boxes and many were in the basement
216 in large cases stowed away. Mr. Eben D. Jordan, Jr., was in my department very frequently, sometimes every day.

Q. When you made your investigation in August, 1885, and set apart the goods that had come from the plaintiffs, how large a pile did it make?

A. I don't recollect that, how many piles or how large they were. There were a good many goods that were pretty old, so that I would hardly recognize at all to tell from which house they came.

Q. I mean which you did recognize and set apart as coming from the plaintiffs—how large a pile?

A. There might have been 25 piles of different sizes.

Q. Do you know what was done with those goods?

A. Yes, sir; I understood that they were put back in stock.

Q. When were they put back in stock?

A. A few days after they were selected.

Q. At that time were there any of the goods that came from the plaintiffs still in the original package?

A. I think there were in paper boxes.

Q. Those that were not yet out of the paper boxes could be recognized by the marks on the boxes, could they not?

A. I suppose so.

Q. There would be no difficulty about distinguishing the goods of the plaintiffs from the goods of other parties that were still in the original paper boxes?

A. No, sir.

Q. It would bear the name?

A. Yes, sir.

Q. Were these turned back into the stock?

A. I don't know anything about that.

Q. You never got them?

A. No, sir.

217 Q. They never tried to turn them over to you?

A. No, sir; I do not say positively that they were there.

Q. You are speaking from recollection?

A. Yes, sir.

Q. You have explained on your direct examination of having marked down certain goods. Do I understand you to say that you marked down goods and sold them for less than you could have got for them?

A. Yes, sir; I don't know when I first did it. No one authorized me to do it. I certainly had no communication with any of the plaintiffs or Mr. Robertson about it. I don't recollect that I sold any of the plaintiffs' goods at less than I could have got for them. I recollect marking down a lot of suits at one time in 1884 that had been bought from these plaintiffs; possibly some in 1885. I marked down some of these below the cost price; I don't remember how much. There were not more than 30 suits, possibly 50, of the plaintiffs'. It was not by their request and it was without authority. I marked them down and sold them for less than I knew at the time I could

have got for them. We advertised in Boston in the various newspapers that we were selling goods below cost. Jordan, Marsh & Co. paid for these advertisements. I did not attempt to conceal the advertisements from the firm. I don't know whether the papers in which the advertisements were were taken all over the building. I presume they were taken in the office right under the eyes of the partners, and when I sold a suit or a cloak of the plaintiffs' at less than it cost us it was at the time when we were advertising that we were selling cloaks and suits below cost. I was never
218 chided by Mr. Jordan or Mr. Marsh for thus advertising. If I marked them down I marked them at least 25% below cost. They cost from $16 to $25 apiece, making a sacrifice below cost of $2.50.

Q. In all the goods that you bought from these plaintiffs isn't it true, with that exception, that they were sold by you above cost?

A. In many cases; yes, sir.

Q. Isn't it true of the aggregate of their goods from May, 1884, to the time you quit that they sold, on an average, on a large profit?

A. I don't remember that.

Q. Don't you believe so?

A. I think so.

Q. And didn't that large profit accrue into the coffers of Jordan, Marsh & Co.?

A. Yes, sir; if there was any profit they had it.

Q. Didn't you increase the business of your department, as shown by your books, from $250,000 a year to $500,000 a year?

A. I think I did. I don't remember just about the figures.

A. Didn't you state to the defendants and others that you would increase that department to a million?

A. I thought I could. I don't remember that I did.

Q. You brought it up from $250,000 to $500,000, and you thought you could bring it up to a million?

A. I would have been very glad to have done so. My object and purpose was to do a very large business, as large as I
219 could, of course.

Q. You have stated that at some time you formed a scheme of which a part was to conceal from Jordan, Marsh & Co. the purchases you made?

A. Yes, sir.

Q. Was your object in that scheme to defraud Jordan, Marsh & Co.?

A. No, sir.

Q. Was it to defraud anybody?

A. No; my sole object was to benefit the department all I could.

Q. And, so far as your purchases of goods from the plaintiffs entered into the result, it was to the benefit of Jordan, Marsh & Co., was it?

A. Yes, sir; that was what I intended to do.

Q. And that was actually the effect, as you know it?

A. I know it did not.

Q. Didn't you state, on the whole, from first to last, that the goods of the plaintiffs sold at a large profit?

A. I was only speaking then of the condition of the department when I left it.

Q. Sold at a large profit up to the time you left it?

A. I don't say at a large profit.

Q. Well, at a profit; and up to the time you left it that has been the actual result?

A. To the very best of my memory, yes. My personal object in that plan was to do a large business and possibly to get more salary. My sole object was to advance and promote the interests of Jordan, Marsh & Co., and so to entitle myself to recognition and a larger salary. I did not get a larger salary while I was doing it.

220 Q. You know this statement K K is a true statement of the business of the defendants as appears by their books?

A. I suppose it is.

Q. There are only two losses in that statement, August, 1884, $1,120.84, and a loss in July, 1885, of $1,555.74; and isn't it true that every six months there was a profit according to that statement?

A. Yes.

Q. And isn't it true that the profits as shown by the statement of January, 1883, were $22,393.69 for the six months then ending?

A. Yes.

Q. For the six months ending July, 1883, $1,131.31; for the six months ending January, 1884, $28,764.09; for the six months ending July, 1884, $12,866.54, and for January, 1885, six months ending then, $39,233.32, and the aggregate profits for that period were $104,000 over all expenses, and, deducting the two items of loss, the whole result from January, 1883, down to July, 1885, when you left, was a total net profit of $101,694.37?

A. Yes, sir; so it reads.

Q. Tell me when you marked down any goods that you had bought from the plaintiffs in 1884 that you have explained here?

A. I never selected those of any particular house to mark down.

Q. Can you say, with the exception that you have stated, that you ever marked down goods bought of these plaintiffs?

A. I cannot say that I remember of any. The original invoice that was sent by the plaintiffs to Jordan, Marsh & Co. with

221 each sale of their goods, and misappropriated by me, I think I saw them in my house, but I destroyed them if I had them; besides my house, I have seen them in the store; I kept them there until about the 1st of July, 1885, when I removed them. I don't remember destroying these specially. I destroyed a lot of papers some time in August. I did not destroy all the bills and invoices of all the parties with whom I had dealings that I had kept unknown from Jordan, Marsh & Co.

Q. Why did you select these plaintiffs for the destruction of bills?

A. I held these bills back because I did not care to have the house know that Schutz Bros. & Blath were in this.

Q. Why did you select the bills of Schutz Bros. when they were claiming the account?

A. They had not claimed it up to that time.

Q. Didn't you say a few moments ago that you had destroyed them after they claimed them?

A. The old bills were in my house then, but I never made Mr. Freeman or our concern acquainted with that fact. I destroyed all the bills after I heard that Schutz Bros. & Blath were demanding their $32,000, knowing that they would send fresh bills with a statement if the house wanted them.

Q. Was it after you had heard that they had rendered an account of the item of their sales through you?

A. I believe it was.

Q. Then you destroyed them when you thought the production of those bills would to a certain extent verify the plaintiffs' account?

222 A. No, sir; I did not take it into consideration at all.

Q. Didn't you know that if you had those bills rendered to you and they conformed to the claim made by the plaintiffs in their bill of particulars that it was evidence in their favor?

A. I do not know it.

Q. You destroyed them after the account was rendered?

A. Yes, sir; I do not know how long after. It may have been a couple of weeks. I don't remember.

Q. Is it not a fact that when Mr. Freeman, of Jordan, Marsh & Co., asked you if you had got them that you really did have them?

A. I had then. I think so. I have no very clear remembrance on the subject now.

Q. Isn't it true that the bills of the plaintiffs which you destroyed had on them a check-mark of the receiving department when you destroyed them?

A. I know they did not have any check-mark on the bills, because no one, after they once got into my box down-stairs, ever saw those bills but myself.

Q. You were retained without any change of salary from the time of that arrangement of yours was discovered by Jordan, Marsh & Co. until Christmas of 1886?

A. Yes, sir.

Q. Didn't you know that you were going to be retained in that way in August, 1885?

A. No, sir.

Q. Didn't you write to Mr. Blath on the 7th of August that you were to be retained all the same?

A. I may have done so.

Q. Don't you remember you did?

A. No, sir.

223 Q. Have you any recollection of writing to him that, "no matter what other people think, I am going to be retained all the same in my place, but I want other people to think I am not?"

A. I don't remember anything of the kind.

Q. Now I come down to some of the things you have stated on your direct examination. Will you say that when you did have your first talk with Robertson that you claim to have had you told him you could not buy of him any goods?

A. Not many goods, nor as many as I would like to, unless some method of concealment could be brought up to cover all this business that we were trying to do. The substance of what I told Mr. Robertson was that I could not buy as many of him as I would like to unless we would keep it from the house, as they were finding fault with the amount of stock I was carrying, and if he would agree with me that nothing should go to the house—no letters, statements, or anything of the kind—but that they should be sent to me direct, I could buy his goods; that was the substance. That conversation took place in my department February or March, as near as I can fix it. It was before the purchases of the spring business began. There was nothing said about the quantity, because I might order a dozen numbers of different suits or cloaks and keep working on those all the season. The substance of it was that I could not buy as many of him as I would like to, unless he could keep it from the house; that they were finding fault with the amount of stock I was carrying, and that I was overstocking, and that if he would agree with me that no letter should go to the house and nothing to show this thing—no statement or letters or communications at all—that
224 they should be sent to me direct and not the house; that is the substance. Afterwards he said he had seen his firm about it and that it was all right and there would be nothing said about it; that we could go on and do this business, and any statements or letters sent or anything that was done could be sent to me.

Q. I come to another occasion. You say that Mr. Robertson came to you one day, long after the bills were overdue, and said his firm wanted money.

A. Yes, sir.

Q. That they wanted it bad?

A. Yes, sir.

Q. I want you to fix that time.

A. I could not fix the time; it was a long time after the bills were overdue, and he asked me to pass the bills.

Q. I want you to fix the place.

A. In my department; that I remember.

Q. Who was present?

A. No one else; he was not in the habit of speaking when any one was present, or I either.

Q. Did he say how much money his firm wanted?

A. I think he had a statement of old bills that he wanted passed; I won't be sure, but I think so.

Q. In what form was the statement that Robertson brought to you on this occasion?

A. A regular statement.

Q. Was it headed with the firm name?

A. Jordan, Marsh & Co.

Q. Is that the one that you say in your direct evidence that Mr. Robertson gave you?

A. I would not be positive as to that. I know he gave me one, and I think that was the time that he gave it.

Q. When was it that you told Robertson—in what interview was it—that the invoices should come as usual and you would
225 get them anyway?

A. That was in the first conversation, I think. He asked me about sending the bill, and I said the bill can be sent as usual to the house, because they will come to me anyway.

Q. If after this discovery or disclosure, as you call it, was made to the firm the plaintiffs had been invited to come to the establishment and take any of the goods that were there that had been sold by them there would have been no difficulty in their doing it?

A. I don't believe there would.

Q. Or Mr. Robertson's doing it?

A. I think so also.

Q. If any opportunity was offered there was no difficulty in distinguishing the goods that came from the plaintiffs from all other goods?

A. I don't believe there would be.

Q. There was no difficulty on your part if you had been invited to do it?

A. No, sir. In taking stock I deliberately destroyed or caused to be suppressed from the books some of the slips taken at the stock account. I did that willfully; I did not do it at the request of the plaintiffs, nor did I ever intimate to the plaintiffs that I did it or that I was going to do it, nor did I tell the plaintiffs that I had done it or was going to do it; it was my own deliberate act. As to the conversation that I had with Mr. Blath in Boston, in August, 1885, I remember his coming to my house in the morning; I think I was in bed. Mrs. Plumley came to my door and rapped and said, "A gentleman wishes to see you." I said, "Who is it?" She
226 said, "I don't know; it is a gentleman with grayish hair." I got up and dressed. In a little while he came upstairs in the front parlor. How we started in the conversation I don't recollect exactly, but during the conversation he said, "You have not put our bills in yet?" I said, No. He said, Why? I said, There may, perhaps, something happen so that I can get you out of this thing without any trouble or loss. He said, How? I said, I don't know at this moment, because we are so mixed up on these other affairs. Then he pulled out this remittance sheet with the red letter, which I had never seen before, and said, "How are you going to get me out of this? If I sign this I sign away $30,000." I saw that we would be defeated and I said that the best thing was for him to go home and send in a statement. He asked, I think, if I would put the bills in, but I did not. That is exactly the conversation as it occurred, as I remember it. There is nothing in the partnership agreement between Mr. Jordan and myself with respect to this suit. There was an understanding, of course, that I should testify, but no agreement to that effect. I would as soon testify for the other side.

Redirect by Mr. MYERS:

Q. Do you remember at the time you entered into the articles of copartnership in regard to the hotel that there was at that time an understanding that you should also testify?

A. No understanding at all except in a general way. Even if this hotel business had not come up I should have testified all the same. Long before this hotel business came up I had given
227 affidavit against certain of these parties. In July, 1886, I went to Kansas City. Mr. Jordan told me the best thing I could do was to go West. I said, Suppose I go out and find the best thing in the world, I haven't any money, as you know. He said, If you find any real good thing and prove it to me I will go in with you. I reported other projects to him besides the hotel. Then I came across this hotel enterprise. I went through the books, saw everything, and Mr. Jordan told me he thought I had struck it, and wanted to know how much it would take to buy the thing. I told him 45 or $50,000, and that it would take $25,000 down. He said, I will give you $25,000 and you can buy it and we will go in partners on it. Prior to that trip West I had made all the affidavits I have made in any of these cases. When I bought the hotel I paid $25,000 cash and gave a mortgage for $20,000, and I gave Mr. Jordan a second mortgage for $25,000 and gave him a note for two years at 10%. I put in no capital and he has had $5,000 on account of the profits up to date.

On the 1st of July or August, 1885, there was about $100,000, possibly $125,000—I don't think $140,000—worth of stock in that department at the selling price. Part of it was new and part was old. There may have been $40,000 old stock. I cannot tell when I selected certain goods that came originally from the plaintiffs how much the amount of plaintiffs' goods were. I cannot tell whether they amounted to $5,000 or not. I would not like to say. It would be a mere guess if I said 5 or 6 or $7,000. I could not tell whether or not those goods thus selected were goods that had been paid for to that house or were unpaid for. I don't know of any way to determine that question.

228 Q. Was there any way that you could have determined that as the goods were?

A. I hardly think so.

Q. What was the character of the goods of the plaintiffs that were thus selected?

A. As I remember, there were a great many goods there that we called old—out of season. Between the time of this exposure and the summer of 1886 I was at the beck and call of these defendants and their attorneys.

Q. What were you doing in and about that department from the time of the first disclosure, early in July?

A. I passed upon some goods that had come in, bought previously to this disclosure.

Q. Who was there besides yourself that could pass upon the correctness of bills of goods that you had bought prior to the exposure?

A. No one.

Q. Are you certain you bought no goods for that firm after the 3rd of July?

A. I don't remember of buying a dollar's worth. I am very positive I did not. The stock on hand on the 31st of January, 1883, as per statement, was $37,937.05; the year following, at the same date, $48,788; the next year, at the same date, $82,920; on July 31st, 1883, $63,507; July 31st, 1884, $88,303; in 1885, $106,206.88. That was the stock as reported by me at the selling price.

Q. Was there any conversation prior to August 7th between you and Mr. Jordan in which you told him that there were any withheld bills due to Schutz Bros. & Blath?

A. No, sir; none.

Q. Was there any in which he told you that he had heard of any?

A. Yes.

229 Q. What did he say to you on that subject?

Objected to by plaintiffs.

The COURT: It is understood now that you refer to the same conversation that Mr. Choate inquired about, and the inadmissibility of the evidence is confined to that subject.

Exception taken.

By Mr. MYERS: State the whole of that particular conversation.

A. It was very short. Mr. Jordan sent for me one day at noon to come to his house, and he asked me if he owed Schutz Bros. & Blath anything. I said no. He said, I hear around that we owe them a lot of money—$20,000 or $30,000. I said, I guess that is all rot. I guess there is nothing in it. We left it there. He took my word for it. It was about the time the other people were sending in their statements—about the first of August or the latter part of July, as near as I can remember; whether the 7th or the 5th or the 1st I could not say.

Q. May it not have been after the 7th?

A. I don't know that.

Q. What conversation, if any, ever took place between Mr. Robertson and yourself in regard to terms?

A. No conversation about terms, because the understanding was—no, there was nothing said about terms.

Q. Absolutely nothing?

A. No.

Q. You said that you sold goods for less than you could get for them. Why did you do that?

Objected to by plaintiffs.

The COURT: Inasmuch as you asked him about it, it is admitted as part of the re-examination.

230 Exception taken.

A. They were marked down to make quick sales, so that I could

get these plaintiffs' money as fast as the sales were made; the larger the sales the more money I could get for them.

JOHN T. GARDHAN, being duly sworn and examined as a witness for defendants, testified as follows:

By Mr. MYERS:

I succeeded Mr. Hewes as manager for the cloak and suit department, in 1885, and have been in that department ever since. I was present when Mr. Hewes, in August or thereabouts, in 1885, selected out certain goods one night. I had been in that department at that time about six years. Some of the goods were laid out as being the goods of Schutz Bros. & Blath. I don't know what they amounted to; I cannot say exactly, but I can approximate it. I should judge that there was from 3 to $5,000, which is as near as I can come to it. I have no way of determining whether they were goods that had been paid for or not, and there was no way known to me by which it could be determined. The goods were kept on the tables and under the tables and in every nook and corner of the large room that we occupied, but as to whether any person could judge the amount of the goods I say they could not, even myself.

Q. Do you know to what extent Mr. Hewes caused goods to be marked down during the last two years of his administration?

A. I do not in round figures, but it amounted to thousands
231 of dollars, to the best of my knowledge. From time to time there were mark-downs made that were not put down on the mark-down book. I made it my business to ascertain the fact.

Q. When?

A. At the time of the mark-downs and afterwards. I watched the thing for a whole six months to see if they did appear in that book. In six months from one stock-taking to another, when goods went into the department, the original tickets were taken off and the new ones put on. There was no way by which it could be ascertained from what particular source the sales came from. There was no way by which a person not familiar with the particular manufacture of Schutz Bros. & Blath or any particular manufacture could distinguish their goods from others. I know Mr. Blath.

Q. Did you ever see him in that department in conversation with Mr. Hewes?

Objected to as immaterial by the plaintiffs. Objection overruled and exception taken.

A. I don't remember.

Cross-examination by plaintiffs' counsel:

There has never been any breach of confidence between me and my house. I do not know what goods came into the department nor what goods came upstairs. It was no part of my duties to see what came in. I saw the goods coming in, of course, but I had no means of checking them off. I was present when those goods of the plaintiffs were set apart in August, 1885. I cannot tell to what ex-

tent those goods had already been paid for or whether they
232 included any of the goods now sued for.

Q. Now, then, what was done with those goods that were set apart and distinguished as goods that had come from the plaintiffs?

A. They were put into stock.

Q. And afterwards sold?

A. No; not sold yet.

Q. They are offered for sale?

A. They are marked down and offered for sale.

Q. Was there any attempt on the part of the defendants to return them to the plaintiffs?

A. I don't know positively. I understood there was some talk of it, but they could not do it; they could not locate them as being paid for or unpaid for. The defendants have asserted ownership from that time to this and treated them as their own goods; that is true of every particle of goods in the store that may have come from Schutz Bros. & Blath, whether they have been paid for or not. I think that my suspicion that Mr. Hewes was doing something irregularly in the department covered more than half a year before the disclosure came out, and they were so strong that I looked into the mark-down book to see if the mark-downs appeared, and I think that for more than one-half year they were not reported. I think it was the same from January to July, 1884, and it was so for three half years. I was not certain of this, but I thought so.

Q. Did you notice in the same connection that the marking down was below what could be got for the goods?

A. I noticed that they were given away.

233 Q. That is to say, that they were marked down below what they could have been sold for?

A. Yes, sir.

Q. You were perfectly satisfied that such things were being done?

A. In my own mind I was satisfied, but I could not prove it.

Q. You could have proved it if you saw what the marking down was on the tags?

A. The tags would not demonstrate anything. I had no means of knowing whether there was any other way of marking down the goods than through that book. I know it did not appear in that book.

Q. That made it clear?

A. No. It did as far as the book was concerned, but not as far as any other mode which I did not know of was concerned. I did not call the attention of the firm to this marking down, because I did not think it was my place to do it.

Q. If they had been vigilant in inspecting the stock and comparing the mark-down book it would have come to their attention?

A. I think likely it would not, because there was nothing to show to them that the goods were marked down.

EBEN D. JORDAN, a witness called for defendants, being examined, testified in substance as follows:

I was born in 1822 and have resided in Boston 40 years, and am the senior member of defendants' firm. My present partners are my two sons, Mr. Eben D. Jordan, Jr., and James C. Jordan. Mr. Marsh died about a year ago. Mr. James Jordan is at
234 present in Europe. Our firm deals in almost all kinds of goods. My department is the general overlooking the whole, and also taking care of the payments of the house and looking after the general interests of all the employees, and also looking after one or two departments in the house; one of them was the suit department, and there were one or two others. Mr. Marsh took charge of the wholesale business. There were over fifty departments. The business ran into millions a year. I think we had more than 2,000 employees. I gave up all my time in the business, excepting about two years ago. The day after the election of Mr. Cleveland I went around the world for seven months and a half. I looked through the cloak and suit department; sometimes, if I was busy, not for a week or a fortnight; other times I would look once or twice a week, perhaps every day. I made no examination of the stock in that department during that period.

Q. Was there laid before you weekly and monthly a written statement of the amount of stock supposed to be in the department at the first of each month and of the purchases and sales subsequent to the first?

Objected to by plaintiffs' counsel as immaterial. Objection overruled, and exception noted by plaintiffs.

A. Every Saturday we had a stock sheet of the stock that we had in each department of the house, and a corresponding sheet of the year before to compare with it to see how the stock stood then and the year before. These statements were made up from the books on the 1st of the month. Then we had a monthly statement,
235 besides the weekly statement, to show how the stock in each department stood at that month as compared with the month previous, and showing also the purchases and sales since the first. Outside of these written statements I had no knowledge on the subject. I relied on these statements entirely.

Q. I will ask you whether or not any of the figures contained in those statements then laid before you did in fact on any occasion excite your suspicion?

Objected to by plaintiffs' counsel as immaterial. Objection overruled, and exception.

A. No. I had no knowledge of the receipt by my firm of any of the goods sued for in this action or of any proceeds from any of these goods.

Q. Will you please state what conversation you had with Mr. Hewes as manager of that suit department prior to the 3rd of July,

1885, and during the years 1884 and 1885 in regard to the amount of stock that he was carrying in that department?

Objected to as immaterial and irrelevant.

By the COURT: I understand you that you wish to prove instructions to Hewes that were not communicated to the plaintiffs.

By Mr. MYERS: I understand that Mr. Hewes testified in a general way to a communication by him to Robertson of a certain objection of the firm to his carrying more stock, although he specified no amount, and this is introduced simply in support of that part of Mr. Hewes' testimony.

236 Mr. Choate, on behalf of the plaintiffs, objects on the following grounds:

1st. Because it calls for private communications between the defendants and Mr. Hewes which counsel had openly avowed, in answer to questions from the court, were not communicated to plaintiffs or to Robertson, their agent.

2nd. Because it calls for private communications at which plaintiffs were not present and which were not disclosed to them.

3rd. Because the defendants have proved by their witness Hewes what was communicated. They are bound by that, and cannot enlarge the effect of it by showing any communications between the witness and Hewes.

The question is then modified as follows:

By Mr. MYERS: Please state what instructions or directions were given by you to Mr. Hewes prior to January 1st, 1884, in regard to the amount of stock that he should carry in that department.

Objected to by counsel for the plaintiffs on the same grounds as the previous objection; and, further, on the ground that it is immaterial.

Objection overruled, and exception noted by the plaintiffs.

A. My instructions to him was to keep his stock down so that he could handle it and turn it, and in that way we could make something; by any other process we could not.

Q. Did that have any special reference to goods of changing styles and fashion that were dealt in in that department?

237 Objected to as irrelevant and as calling for a conclusion in the witness' mind.

The COURT: If he gave any directions as to this particular kind of stock he may state them.

Objection overruled, and exception noted.

A. Yes, sir; the goods in that department in a month or two weeks—sometimes the whole thing would change. I made those same statements to Hewes—that the market changes, so sometimes a cold spell or a hot spell would make a great difference in the kind of goods he was carrying, and I told him to keep his stock down; buy often and turn it quick.

The court states that it takes all these questions relating to the directions to Hewes under the objection and exception of the plaintiffs, and thereupon counsel for the defendant proceeds.

Q. What, if any, conversation did you ever have with Hewes on the subject of his carrying in that department goods obtained from any source that he should not report to the firm?

Objected to by plaintiffs' counsel on the same grounds as before. Objection overruled, and exception taken by plaintiffs.

A. None.

By the COURT: You mean you had no such conversation?

A. No.

Q. What, if anything, ever passed between you and Hewes in any way, shape, or form, orally or by writing or otherwise, in regard to his conducting that department in such a way as not to

238 report to the firm his purchases made for the firm?

Objected to as immaterial and as not disclosed to the plaintiffs. Objection overruled, and exception.

A. None. I first learned that Mr. Hewes had been carrying goods in that department that he had not reported to the firm, I think, about the 3rd of July, 1885. Prior to that time I had no suspicions of Mr. Hewes.

Q. At that time did you hear the names of these plaintiffs mentioned?

Objected to as immaterial; objection overruled; exception.

A. I never heard of them in my life until after this case commenced—I mean until after they brought this suit in court. I remember a statement of about $32,000 coming from the concern about the 25th of August. I knew none of these plaintiffs personally. The adoption of the red-letter sheet put in evidence, dated August 7th, 1885, was had after the firm learned of these irregularities.

Q. Was that remittance sheet sent out indiscriminately to every person to whom a remittance was sent or not?

Objected to by plaintiffs; objection overruled, and exception noted.

A. To every person who had an account on our ledger—to every firm on our ledger that was sent. I never saw or did I know anything about the letter dated February 28th, 1885, from these plaintiffs to my firm referring to an invoice of the day immediately preceding and inquiring whether or not two garments had been shipped to my firm along with other goods specified in the invoice of the day before, nor of the letter in March, 1885, to the same effect.

239 Cross-examination by plaintiffs:

We got the proceeds of any goods sold in our departments. In August, 1885, by the rendition of the account, we became aware that

the plaintiffs, Schutz Bros. & Blath, claimed that they sold to our firm since May, 1884, $32,000 worth of goods, and I sent Mr. Bassett to make an investigation. I also directed a selection to be made of the goods that came from the plaintiffs that could be identified in the establishment and set them by themselves.

Q. Did you make any offer after these disclosures were made to you to return plaintiffs' goods found in your possession?

A. I think not.

Q. Have you ever since August, 1885, made any offer to return the proceeds of any of their goods that had been sold?

A. No; we could not tell whose they were.

Q. Assuming the fact to be, as proven by Mr. Hewes, that they all sold for more than cost, now, have you made any offer to pay them anything on account?

A. No; I think that on the 25th of August, 1885, almost all the goods that Mr. Hewes had obtained from the plaintiffs had been disposed of and the proceeds of all that were sold had come into our possession.

Q. Was it by your authority that after the goods had been recognized as having come from the plaintiffs and set apart that they were turned back into stock?

A. I think it was. I don't recollect the circumstance.

Q. Do you know whether they have been sold or not?

A. I do not.

240 Q. If they have been sold the profits have come into your hands?

A. Of course. I went through the department every day, nearly—sometimes, perhaps, not for a week. I went through to see how things were getting on. I understood that everything that was there was there for sale on our account, and everything that was there was purchased for our account and our credit.

Q. You thought so when you were there and you know so now?

A. Of course.

Q. What is the total amount of the claim of goods sold & delivered to your firm that you are trying to deduct after you have become aware that your firm received & sold the goods & realized the profits?

A. I cannot answer the question in that way. We found that we were owing $250,000 & not a dollar to show for it on our books. We continued Mr. Hewes' salary of $2,000 until Christmas, 1886, after all the disclosures he had made. He was to work under instructions of our counsel. We were trying to find out what we owed. We never wanted to defeat anybody. We always wanted to pay what we owed.

Q. Now, about your partnership with Mr. Hewes. When you entered into that partnership with him you had full confidence in him, didn't you?

A. I had. I believed him to be honest. I believe that he was misled into this transaction, and that he received no benefit from it. I believed that he had not made a dollar out of the transaction. I

believed that he was ruined and these men had ruined him, and I was willing to send him West to make a new start in life.

Q. If you could get 10% on your investment?

A. What we considered a good investment.

Q. And half the profits?

A. Yes, sir.

Q. On those terms you would be willing to give him a fresh start?

A. Yes; or any other man.

241 Q. Didn't you believe that he had done all he had done intending it for your benefit in these cases?

A. Yes.

Q. Then I believe you are willing to say that you think that if he transgressed his authority it was an innocent transgression?

A. I think that he got into this scheme with these men and they had the power over him and he could not extricate himself and he went on from bad to worse, until finally we lost $250,000. It showed that on our books.

Q. Do you think it was an innocent transgression on his part?

A. No; I don't think it was particularly innocent. Any one who could get into a case like that could not be innocent.

Q. Now, tell us what you believe. Do you believe that his purpose and his sole purpose was to make large profits for the firm and so ingratiate himself with his employers and get a larger salary?

A. He was naturally ambitious to make a large business and he fell like a great many other ambitious people.

By the COURT: That does not answer the question.

Q. Do you believe that was his purpose and sole purpose?

A. I think so; yes. I believed he was honest, so far that all the money he got he turned into us.

Q. I am not now talking about money, but about making these purchases in your name and on your account. Do you believe that was honest?

A. Yes, sir.

Q. And you have sustained him ever since?

A. Yes.

Q. And you are now his partner?

242 A. Yes, sir.

Q. On the terms stated by him?

A. Yes, sir. I have never made any criminal or civil complaint against Hewes or transferred to him any liability for these goods or ever intimated or claimed that the sales were to him and not to me. The $25,000 that I put in I drew out of the bank. We got it in our legitimate business.

Q. Is that the same bank account in which you had previously deposited the proceeds of plaintiffs' goods?

A. The proceeds of our business we don't specify.

Q. They had gone in there?

A. Probably.

Q. Did you do that to Mr. Hewes as a reward or as a punishment?

A. I did that as I have done for a great many other young men that wanted to be lifted up and started in life. He was broken; his name was discredited, and somebody had got to take hold and give him a lift. I gave him a lift solely as I would and have done for a great many others.

Q. Was it solely from benevolence?

A. It was solely because I was interested in him, and the young man was ruined without I came to the rescue. I came to the rescue, and told him to go West and see what he could find. I advanced this money partly through benevolence and partly through sympathy. The $25,000 that Mr. Hewes received was my individual money. I took it from the firm account and charged it to myself. Our firm advertised largely, and if Mr. Hewes, in the summer of 1885, advertised that the firm were selling suits and cloaks for $20 that cost $50 it was not only true, but sanctioned by my firm. I don't know that he did so. On the 25th of August the plain-
243 tiffs' account came in claiming $32,000, and the items of the goods were specified.

Q. Is it possible that you never asked Mr. Hewes if he had bought those goods?

A. I never asked him.

Q. Is it possible that you never asked him whether he had sold those goods and received the proceeds?

A. I never had any conversation with him about it.

Q. Why didn't you ask him?

A. I don't know about that. I didn't ask him anything about anything.

Q. Did you or not desire to know whether the plaintiffs' goods had been bought by Mr. Hewes in your name?

A. I didn't ask him anything about it; I didn't think anything about it.

Q. Did you desire to know it?

A. No; I don't know that I did.

Q. Then you desired to keep yourself in ignorance, didn't you?

A. No.

Q. You knew that Hewes must know whether he had bought the goods or not, didn't you?

A. I presume so.

Q. And you purposely refrained from asking whether he had?

A. No.

Q. On the 25th of August you received a demand from the plaintiffs for their money for the price of the goods, didn't you?

A. Yes, sir.

Q. Didn't you think it your duty, then, to ascertain whether
244 the goods had been bought in your name and on your account?

A. No.

Q. I ask you to tell the jury why you did not think it was your duty to find out whether it was correct.

A. We had no record on our books of any $32,000, and we did not suppose we owed them $32,000. We didn't suppose there was anything of that kind in existence.

Q. Didn't you think it your duty to inquire?

A. I didn't inquire about it at the time. We thought there were a lot of these things we could not understand and could not know anything about. By and by we were sued, and it became our duty to defend it or pay.

Q. Now, before putting in your answer, didn't you consult with Hewes about it?

A. No.

Q. Didn't you ascertain from Hewes whether the facts you stated were correct or not?

A. No.

Q. You then believed him to be honest, didn't you?

A. Yes.

Q. On the 25th of November, by that time you were satisfied again that Hewes was honest, were you?

A. Yes, sir.

Q. And you didn't consult with him about this answer?

A. No. When I adopted it I believed the answer to be true.

Redirect examination:

What I mean by stating that I considered Mr. Hewes honest today is that I was satisfied that he received no benefit himself personally. Of course, we all know that it is very dishonest to go into collusion with these parties and carry on this business and make a loss to Jordan, Marsh & Co. of $250,000. Of course, we know that it is not honest, but what I wish to imply is that he was
245 honest in receiving himself no benefit.

Q. Is it not a fact that you are defending this suit and others by the other claimants whose names you mention because you have believed and now believe still that the payment of these asserted claims would not only extinguish any profit that was made in that department managed by Hewes in the last two years of his management, but also entail a loss on your firm?

Objected to by counsel for plaintiffs as leading and immaterial. Objection overruled and exception taken.

A. Yes, sir.

Q. Any goods that were on hand in August, 1885, and were selected by Hewes, what means, if any, had you of ascertaining whether they were paid for or not?

A. None. I had no knowledge of my own as to what goods went into the establishments from Schutz Bros. & Blath, nor any way of determining that definitely, or what was realized for any particular goods at any time or what particular goods were sold.

ALFRED SHORE, called on behalf of the defendants, being duly sworn and examined, testified:

I am in the cloak and suit department of Jordan, Marsh & Co., and have been for four or five years last past.

Q. What do you know about goods being marked down while Hewes was in charge, from August 1st, 1885, without being entered in the mark-down book, and the extent of such marking down?

246 A. He marked down a very considerable in that time, amounting to $30,000 or $40,000 that I know of personally myself. I had to mark those goods down, and I furnished a record to Mr. Hewes, and I know he did not enter those marked down.

Q. And what there may have been beyond that you do not know?

A. I do not know. I acted under Mr. Hewes' instructions in marking goods down. I know that there were at least that many marked down that did not enter in the mark-down book. I know there were from $30,000 to $40,000 that I have personal knowledge of, but whether there was a hundred thousand more or not I do not know.

Cross-examination by Mr. CHOATE:

Q. If you knew all this rascality was going on why did you not report it to the head of the house?

A. Mr. Hewes was the head over me. I had nothing to do but act under his instructions.

Q. What was there to prevent you going down to Mr. Jordan and telling him all about it?

A. He would have gone to Mr. Hewes about it, and he would have given some excuse that he was going to enter them the next month or the following month, and I would have got myself into trouble.

Defendants here rest.

Plaintiffs thereupon, by consent of counsel, put in the calculation as to interest, making the total claim of the plaintiffs, including interest, $3,648.68.

247 Thereupon counsel for plaintiffs asked the court to direct a verdict for the plaintiffs for the amount claimed on the ground that no defense had been proved or attempted to be proved.

The motion was denied and the plaintiffs except.

Whereupon plaintiffs called the following witnesses:

LEWIS C. MOTT, recalled by plaintiffs, says:

I have compared the packages which Mr. Bassett said were not found in the defendants' package book with the express receipt books of the Boston Despatch Co., which are in evidence, and I have receipts for all packages claimed excepting the one which was delivered on Sept. 15th by Mr. Robertson.

The COURT: I do not call to mind that your case has been shaken in that respect. I do not call to mind that they disputed at all the case you made that all these goods were delivered to the Boston Despatch Co.

By Mr. MYERS: We do not introduce any evidence one way or the other. We left the case where they left it. We do not formally admit anything, but wherever their evidence left the matter there do we leave it.

Mr. BLUMENSTIEL: It is understood that they do not combat our evidence.

Mr. MYERS: It is understood that we have called no witnesses on that particular point, and this is not in rebuttal.

Mr. BLUMENSTIEL: Then that is all.

EDWIN F. PORTER, a witness duly sworn for plaintiffs, testified, in substance, that he resided in Philadelphia; that he was formerly in the employ of Jordan, Marsh & Co., during the years 1884 and
248 1885; had charge of the stock of shoes in their shoe department.

Q. Do you know of any instructions being given to you by Eben D. Jordan with reference to keeping back bills for shoes purchased for that department?

Objected to by Mr. Myers as immaterial. Objection sustained. Exception taken by plaintiffs.

J. M. ROBINSON, recalled for plaintiffs and examined, testified:

I have heard the testimony of Mr. Hewes, and heard him testify with reference to a conversation which he said he had with me in the early part of 1884.

Q. He stated that he went to the Parker House, where you were, and that he said to you that he did not believe that he could buy any goods of you just then because he was already carrying more stock than the firm wished he would; but he would like goods very well if he could get them. Was any such thing said as that?

A. No.

Q. He stated further that he said to you that if you would see that no statements were sent to the house nor any dunning letters or bills of any kind he would be able to buy goods of you. Was anything of that kind said?

A. No, sir.

Q. Mr. Hewes testified as follows: "And I told him that if he would see that no statements were sent to the house nor any dunning bills (page 531) or letters of any kind, unless they came to me personally, I might be able to buy some of them." Was anything of that kind said?

A. No, sir; and nothing to that effect at that or any other time.

249 Q. Mr. Hewes further testified as follows: He said that you said that you thought you would see the house and you had no doubt but what it could be done—referring to the keeping back of letters and bills of goods purchased. Was anything of that kind said?

A. No, sir; I had no occasion to say anything of that kind.

Q. Did you, in point of fact, communicate any arrangement what-

ever, supposed or otherwise, with Mr. Hewes to the house of Schutz Bros. & Blath or any member of that firm?

A. No, sir.

Q. After that Mr. Hewes said you came back, a week or two after that, and stated that you had consulted the house and they had agreed to the proposition. Was there any such statement made?

A. No, sir; and nothing to that effect.

Q. Did Mr. Hewes at any time say anything with reference to the size of the stock he was carrying?

A. Not that I remember.

Q. When you say "not that I remember," do you use the word "remember" as excluding a doubt?

A. I never talked with him about his stock.

Q. You mean that it didn't occur?

A. I don't remember.

Q. Subsequently, on the cross-examination, Mr. Hewes further testified, with reference to this alleged conversation, that you had told him that you would see that no statements were sent to the house. Did you say anything of that kind?

A. No, sir.

Q. He also testified in some portion of his direct testi-
250 mony that he communicated to you the fact that bills, if sent to the house, would go to him anyhow, and that the firm of Schutz Bros. & Blath might send on their invoices or bills regularly; they would go to him anyhow. Was any such language as that communicated to you?

A. No, sir.

Q. Was anything said about it?

A. No, sir.

Q. Would you have been able to identify the goods of Schutz Bros. & Blath if you saw them?

A. Yes, sir; I could identify any goods I sold them by the style and the numbers, by the style without the numbers, by the design.

Q. Mr. Hewes stated that you applied for money and he said to you as follows: "I told him I would pass the bill just as soon as I possibly could. I also told him I would have to have some undated bills, so that I could pass these without the attention of the firm being called to any erasure of dates, that I certainly could not pass them on the old dates," and then he says that you said in answer to that that you would get them. Was any such conversation as that had?

A. There was no such conversation. He wrote me a letter for bills. I have no knowledge of the inside workings of the house of Jordan, Marsh & Co. nor of the fact, if it is so, that bills that were mailed directed to the house would, instead of reaching the members of the house, go direct to Mr. Hewes, or that the goods received in the house would not be known to the firm as having been
251 received. I have no knowledge on the subject at all. The reason I asked Mr. Hewes for money was that he was the only party I knew, and the firm requested me.

HENRY BLATH, being duly sworn on behalf of the plaintiffs, says:

I am one of the plaintiffs. Prior to the engagement of Robertson our sales in the New England States were very small. After Mr. Robertson was engaged he took charge of the New England States, and they increased. I have no knowledge of the routine of Jordan, Marsh & Co.'s business in respect to paying bills or the reception of the goods. I have no knowledge of any alleged arrangement between the buyer of Jordan, Marsh & Co. and my salesman. No conversation was ever reported to me on that subject. I heard the testimony of Mr. Hewes, and I have heard that portion of it which referred to an alleged arrangement between himself and my salesman. No such arrangement was ever reported to me, and there was no authority on the part of any one of our house to make any such arrangement. I had no such conversation with Mr. Hewes as he testified to, nor did I ask him if he had passed any bills yet. I asked him frequently whether he would not call the attention of the house to send us some money. Mr. Hewes said he would see to it; that in a day or two some money would be remitted; that is all. I never asked him if he had passed some bills yet, especially the older ones, or said to him that they were pretty nearly able to walk, some of them were so old. While he kept promising to pay us orders kept coming in all the time, and the account grew con-
252 tinually. We got some money from the firm in December, 1884, and some in July and August, 1885. We considered the house a perfectly good one, and we did not care about pushing them hard for the money. Goods came in by degrees and we did not desire to lose their custom. I never gave any statement of any account to Mr. Hewes, nor did I ever ask him for any particular amount. I remember our firm receiving the remittance sheet of August 7th. When I received it I went to Boston, and I looked for Mr. Hewes in the store and they told me he was at home. I went there and saw him. I showed him the remittance sheet and I asked him what it meant. I told him that the house was owing that amount, and he said, Never mind; that is all right. I said, It is not all right, because they want a receipt in full for that amount, and he said, Never mind; it is all right; it will be paid. Your goods sold well, and you will be paid. Up to that time our firm had no knowledge that any bills which had been sent to the firm had been withheld from them, or that the firm were in ignorance of the amount of indebtednets to our house. When I left Mr. Hewes at that interview I told him that as long as they demanded a statement we would send it at once. I was not in New York when this remittance sheet first came. I have heard the testimony in the case about some blank-dated bills being given by our book-keeper to Mr. Hewes. I only learned of that after there was any objection to paying our account. When the remittance sheet of July 1st and 9th came in we knew nothing of it, excepting of the receipt of the money. Our at-
253 tention was first called to it when we were getting our papers together. I had no knowledge or reason to believe while these sales were going on that Jordan, Marsh & Co. were not fully

advised of the sales being made and of the delivery of the goods and of the receipt of the invoices. We received a letter from Mr. Hewes to our Mr. Blath, in which Mr. Hewes stated he would remain in the house. This is the letter and the envelope.

Counsel offers the letter and envelope in evidence, and same marked Pl'ffs' Exhibit No. 19.

BOSTON, *August 7th*, 1885.

FRIEND BLATH: I wrote you yesterday, but found my letter was left on my desk unsent. However, I will try again, and I think this time it will be all right. Now, I want to take this occasion to tell you to have no uneasiness whatever in regard to your account. No matter what other people may complain of and to what trouble they are put to to get a settlement, you may take my assurance that I am particularly interested in your account and propose to protect you if you and your partners will give me a chance. I have passed all bills into the hands of the firm, with the exception of yours, and would have put yours in, but I saw trouble ahead for the others, and big trouble at that. It will be a long day before they will get a settlement, and it serves some of the dirty lot just right, and I do not propose to put you in the same box. I think too much of you and of your house, and I know you think equally well of me. One thing I can tell you in confidence: I am to
254 be with the house all the same right along, although I want others to think I am not or anything they like. Do your best to prevent any possible way of my house knowing you are in the mess at all, and if you are asked for a statement, either by letter or any person, by any one, try and make it appear that you have none to send. You must do this for your own interest and leave the rest to me. I will try and see you next week, if possible, and more fully explain things to you. All that I can say in a letter is do as I tell you and you will be all right. If you want to write me anything between now and Thursday next send it to No. 5 Allston street, and I will get it quicker.

With best regards I am yours,

J. H. HEWES.

This letter I saw when I came back from Boston. I knew then there was a rumor about trouble with Jordan, Marsh & Co. The first knowledge I had that our bills did not get into the hands of the members of the house was when I saw Mr. Hewes in the interview of August, 1885, and then afterwards I got it again by this letter.

Q. What had you heard about trouble with the house on the part of Hewes about this time—August 7th or 9th?

A. I had heard that he had concealed bills.

Q. You had heard it in what way?

A. I had heard it generally rumored in New York.

Q. When you got in from Boston did you give any orders about sending a statement?

A. Yes, sir.

Q. At once?

A. Yes, sir.

255 Q. Do you know anything further about what occurred after that except what you have learned since? Did you know anything as to whether your orders were obeyed?

A. I heard the statement was sent. I knew nothing of the receipts given for money sent by the remittance sheets of July 1st and 9th. I gave no instructions about it; I never saw those receipts or heard of them until they were produced in court. I desire to correct myself. I saw them over in Boston when they were shown to me by Mr. Freeman, an employee of Jordan, Marsh & Co.; that was some time after we had sent our statement, and in August Mr. Jordan referred me to Mr. Freeman. Mr. Freeman showed me these receipts and remittances and asked me if I knew anything about it. I told him I didn't know anything about it. I asked him if he would pay the money out, and he says, "No," I should wait until I got it. I said, "How long is that?" and he says, "We will never pay that unless we are compelled to pay." There was no intimation by Mr. Freeman or Mr. Jordan at that interview that they had not received all the goods represented by that statement, nor any statement made that the house had suffered any loss.

Q. Was there any offer at any time by the defendants to give back any property which they had received from you?

A. No, sir.

Q. Or the proceeds of the property?

A. No, sir.

Cross-examination:

256 Q. Do you not look over your ledger at all to see how your sales are running and how you are doing with particular customers, especially the leading ones?

A. I do not.

Q. And you never did during the year 1884 and the first half of 1885?

A. I do not think I did.

Q. Of course, you knew that Jordan, Marsh & Co. owed you a great many thousands of dollars?

A. I knew that.

Q. How did you know that?

A. We spoke of it among ourselves.

Q. And you knew it was a growing account, increasing in size, did you not?

A. Yes, sir.

Q. It was the only house reputed very solvent that took over six months to pay what it owed, was it not, that you had on your books?

A. Yes, sir.

Q. And you did not have a house on your books that was reputed more solvent or one that you were more anxious to sell?

A. No; we did not have a more solvent house.

Q. How often do you think it was discussed between yourself and your partners?

A. Several times—maybe a dozen times. It might have been more. I cannot exactly state that.

Q. You felt that the money was drawing six per cent.?

A. I felt if they paid later we would allow them less discount.

Q. And you were so well fixed that you could afford to wait for the money?

A. Yes, sir.

Q. And you did not need money yourself specially?

A. No, sir.

Q. You had all you wanted?

A. Yes, sir.

Q. Coming down to these times when you communicated with Hewes, did you want the money then?

A. Certainly we did.

Q. Need it?

257 A. I do not know that we needed it badly, but we needed it just for the time being.

Q. You remember there was some pretty active telegraphing to Hewes, almost daily, in the month of June, 1885, for money?

A. I was not in the city then. I was not home.

Q. Do you know whether the firm needed money then?

A. I told you I was not home.

Q. In June, 1885?

A. In June, 1885.

Q. Where were you?

A. In Europe, I think.

Q. When did you return from Europe?

A. About the beginning of July.

Q. Are you certain of that?

A. Positive.

Q. And you say you did not get back until after the 1st of July?

A. It was after the first of July when I got back; about the 10th.

Q. Then who would know most about the condition of your firm in June, 1885, when that telegraphing was going on?

A. I suppose my partners.

Q. Did not the very first intimation that you got about the house holding back bills impress you, affect you, strike you with peculiar force?

A. I did not know that he kept ours back.

Q. Can you give us the name of any person who conveyed this rumor to you?

A. I think I heard it spoken of by Mr. Schwab.

Q. And when?

A. Just about that time.

Q. About the time of your return?

A. Yes, sir.

Q. Who else told you about that time?

A. I do not think any one else told me. I heard it spoken of all over.

Q. Did you hear the one rumor or did it come to you from various sources?

A. I heard the houses mention it that were interested in it.

258 Q. Did it not strike you at that time that perhaps that was the reason why Jordan, Marsh & Co. had not remitted any money to you—that he had held back your firm's bills?

A. No, sir.

Q. That did not at once occur to you?

A. It did not.

Q. When did you first try to find out whether he had kept back your bills?

A. When that remittance sheet came with the red printing on it.

Q. Do you know why your firm made so many efforts by letter and telegrams in June for money and none in July?

A. I suppose they needed money in June and did not need it so bad in July.

Q. Can you explain how it is that you did not know—that it did not occur to you when you heard these rumors about the house—that perhaps that explained the failure of this very solvent house of Jordan, Marsh & Co. to send you money?

A. I cannot tell you anything about June or July, or June anyway.

Q. You know it is the custom of solvent houses to earn as much in the way of discount as it can, do you not?

A. Yes, sir.

Q. Did you see Hewes between July 3rd and August 20th?

A. I did.

Q. You said you saw him just after the receipt of the August 7th remittance?

A. Yes, sir.

Q. Did you see him between July 3rd and that time?

A. I do not think I did.

Q. I do not know. Think a moment. Let your memory

259 run back over the past and say if you can call up any occasion.

A. I did not.

Q. Now, between the 3rd of July and the 25th of August did you see him in Boston?

A. Yes, sir.

Q. How many times?

A. Once.

Q. You were positive of that?

A. Well, I am not so very positive of that. I saw him once positively. I may have seen him once more, but I do not remember that.

Q. What was the occasion of your seeing him the first time between the time you got back from Europe and the end of August?

A. I wanted an explanation of what that remittance sheet meant where they demanded a statement in full for all the account when they only remitted $1,000.

Q. You had not that private letter of his of August 7th at that time?

A. No, sir; I had not.

Q. I call attention to the fact that the letter of August 7th bears date the same day as the red-letter remittance sheet which was sent by the firm. Now, do you affirm, as matter of memory, that the remittance sheet and this letter did not come to you by the same mail? Do you say that those two documents did not come by the same mail?

A. I could not tell you that. I am not in the office when the mail comes in; I am in the factory.

Q. You do not mean to say that you left here on the 8th of August?

A. No, sir.

Q. You do not know that you left on the 9th, do you, as matter of memory?

A. I would not be positive as to that.

Q. As matter of memory, do you not know whether you
260 had this letter at the time you left here for Boston?

A. No, sir; I did not have the letter when I left here for Boston.

Q. What makes you say that?

A. Because when I got home I found it in the office. When I saw Mr. Hewes in Boston in August he told me that the largest portion of our bills were in the office. He did not tell me that he had surrendered to his firm the bills which up to that time he had concealed, but that he had not surrendered ours and did not want to surrender ours, and that he wanted to save our house from exposure, and that he proposed to protect our house if I and my partners would give him a chance.

Q. And did you not at that time produce this red-letter remittance sheet and ask him how I could get around that?

A. I did not ask him how to get around anything. I asked how it was that we received this remittance sheet and how the house could take the stand they did, that they say they want a receipt in full for all claims to date, when they only remit $1,000, and he said, The bulk of the bills are in the office, and rest assured you will be all right; that we are satisfied with your stuff, and the house knows it, and you won't have any trouble. That is the substance of what he told me, and he said the bulk of the bills are in the office.

Q. Did you ask him then how many he had withheld?

A. No, sir; I did not think I had a right to ask him if he had withheld any, because we mailed them to the house. Every
261 bill we sent with the goods went to the house. I was with Hewes that day four or five hours; we spent the day together.

Q. And you went over there on this business, did you not?

A. No; not specially. I generally go to Boston to meet Mr. Robertson. I went to meet Mr. Robertson to sell goods.

Q. Did you meet Mr. Robertson that day?

A. I did not.

Q. What other business did you attend to that day?

A. Nothing at all, excepting spend it with Mr. Hewes.

Q. Then you did go on that business?

A. I did not; but as long as I did not meet Mr. Robertson that was the best thing I could do.

Q. You got the red-letter remittance sheet, you took that with you, and you did spend the day on that business?

A. Yes, sir; waiting for Mr. Robertson.

Q. Where?

A. He was to meet me in Boston with his samples.

Q. Why did you not wait for him?

A. I found out that he could not just meet me, and I went home.

Q. Having the red-letter remittance sheet with you and spending the day on this matter and knowing that Hewes had withheld some bills of other people and that your claim was part of it, if not able to walk, at least 14 months since it was sold, why did you not go to the office of Jordan, Marsh & Co. and see some of the firm about it?

A. I went to the office of Jordan, Marsh & Co., and Mr. Hewes was the only one I knew there.

Q. At all events, you did not go to the office and see either of the firm or try to?

A. Not then; no, sir.

Q. You were not indifferent about $30,000; you were not careless about an amount of that sort?

262 A. No, indeed, I ain't.

The WITNESS: I have a correction to make. I stated that I was in Europe in 1885, aud I think now it was in 1884 that I was in Europe. I go to Europe twice a year. I have refreshed my memory since I testified, and I think it was 1884 that I was in Europe and not the spring of 1885. I was in January, 1885, in Europe, but not as late as June and July.

Q. Do you think that the remittance sheet of Au'st 7th which you say took you to Boston arrived here before the letter of August 7th?

A. I did not see the letter of August 7th until I returned from Boston.

Q. Who gave the remittance sheet to you?

A. The book-keeper gave it to me.

Q. Who gave you the letter?

A. The letter was lying on the desk when I came back.

Q. You took the night train to Boston, did you not?

A. Yes, sir.

Q. Then of course you did not leave, at the earliest, before the night of the 8th of August?

A. Yes, sir.

Q. And you are not sure you left then?

A. No, sir.

Q. This letter is addressed to Mr. Blath, care of Schutz Bros. & Blath, 356 and 358 Broadway, New York. Was that your address?

(Hands paper to witness.)

A. Yes, sir.

Q. What is the date of the Boston postmark on that letter?

A. The 7th.

Q. What is the date of the New York stamp—of its receipt here in New York?

A. The 8th.

Q. What hour of the 8th?

A. I cannot distinguish that.

Mr. MYERS: May I pass it to the jury?

263 Mr. CHOATE: Oh, certainly.

Q. What did you do about the letter?

A. Nothing at all; I kept it.

Q. What length of time intervened between that visit to Boston that you have just referred to and your next visit, if you made another?

A. The following month.

Q. Did you write to Mr. Hewes?

A. I can't tell whether I did or not.

Q. I mean after you did get to read this letter.

A. I cannot tell whether I did or not.

Q. Why did you wait until the 24th of August?

A. I can't answer you that any further than that the book-keeper, who had a sick child, was off and on in the store, and I suppose that caused some delay; but I am not attending to the office business at all.

Q. Did you report to your partners what took place in Boston?

A. Yes, sir.

Q. Did you show them this letter?

A. I showed them this letter after I had read it, when I came back. I showed it to them, certainly.

Q. Why didn't you communicate, if you can tell, before the 24th?

A. I gave you the reason. The book-keeper, who was off and on, had a sick child, and was not in the store much.

Q. Do you know what Mr. Hewes meant by this sentence: "Do your best to prevent any possible way of my house knowing you are in the mess at all." Do you know what he meant by that?

A. I do not.

264 Q. Do you know why he should dare or presume to write such a thing if you were not in the mess?

A. I cannot assign his reasons for writing letters.

Q. Do you know why he should presume to say to you if you were asked for a statement, either by letter or in person, be honest, "Try and make it appear that you have none to send?" Do you know why he should have presumed to say that to you?

A. I do not.

Q. I suppose you and your partners, after you did receive that letter, were in frequent consultation about this claim, were you not?

A. Yes, sir; we were occasionally in consultation.

Q. Do you know when this statement dated August 24th was made up?

A. Yes, sir.

Q. And you were consulted about it—that is, you and your partners conferred together about it?

A. I don't know that they consulted me; I might not have been in the city at the time.

Q. Have you any explanation to make of the delay in sending that letter or the statement that the person attending to that department had returned that morning from his vacation, except what you have already stated?

A. That is all.

Q. That is the only explanation you can give?

A. That is the only explanation I can give.

Q. Had you any personal knowledge whether your house had ever before that, August 24, sent Jordan, Marsh & Co. a statement?

A. Statements? I have knowledge of that—that Jordan, Marsh & Co. got several statements from our house.

265 Q. Have you any knowledge except what Mr. Mott told you?

A. Well, no.

Q. Do you happen to know why that fact was not mentioned in your firm's letter of August 26th?

A. No, sir?

Q. Was that fact referred to in your consultations between you and your partners that statements had been sent to the firm?

A. I think they copied generally these statements when they sent them.

Q. In your talk among yourselves when this trouble arose?

A. No, sir; I don't recollect speaking about it. We looked over the books, and we found they had had statements sent them.

JULIUS SCHUTZ, a witness for the plaintiffs, being duly sworn, testified in substance as follows:

I am one of the plaintiffs, and tend to the selling, finances, and correspondence of the firm, have no knowledge of the details testified to by Mr. Jordan as to the manner in which bills are passed through the house and goods are received and sent into the departments; never knew anything about the routine of defendants' business.

Q. You knew of the mailing of the invoices with each shipment?

A. Yes, sir.

Q. And the amount, as a general thing?

A. Yes, sir.

Q. Where did you suppose these invoices went when they were mailed?

A. In the United States mail box.

Q. But where to?

A. Jordan, Marsh & Co.

263 Q. Who did you suppose received them?

A. Jordan, Marsh & Co.

Q. Have you any knowledge or information of any kind that, instead of Jordan, Marsh & Co. getting them, they were got into the hands of Mr. Hewes?

A. No, sir.

Q. Had you any knowledge, if it is a fact, that those invoices, when they got into Mr. Hewes' hands, would be kept by him?

A. No, sir; no statement of that kind was made to me. I know positively that statements were mailed to the defendant about two or three times. I know the three statements put in evidence were sent to Jordan, Marsh & Co., Boston, Mass., by the United States mail, and I have no knowledge that they did not reach their destination, or that they came to Mr. Hewes and not to Jordan, Marsh & Co.; nor have I any knowledge that the firm of Jordan, Marsh & Co. did not know that goods were shipped to the house, came to them, and were received by them.

Q. You never heard until some time after the trouble that there was any claim made whatever that the goods that were shipped did not go regularly into the department; that the firm did not know anything about it, and that the invoices that were sent were not received by the firm in due course of mail?

A. None whatever.

Q. And you had no complaint from Jordan, Marsh & Co. of the non-receipt of the goods?

A. None whatever.

Q. And none of the statements containing the invoices ever came back to you?

A. None whatever. We were never informed of any ar-
267 rangement between Robertson and Hewes, such as has been testified to.

Q. Now, Mr. Hewes has testified in regard to an interview with you. I will read what he says and then you can tell me what you have to say about it.

"Q. You say you had a talk with Julius Schutz?

"A. Yes, sir; I saw Julius Schutz in Boston; one day he came there, he said, to collect a bill of C. N. Carter. He also said that his brother wished me to pass some bills right away, and he hoped I could that day. I promised him I would, and I remember passing about $1,500 for him. Later in the day he came to me and said his brother had telegraphed him that $1,500 was not enough. He wanted more. I promised to pass some more at the earliest moment I could."

What have you to say in regard to that?

A. I never made any such assertion.

Q. Was there any such conversation had with you?

A. None whatever.

Q. Were you ever there in Boston to collect a bill of Carter?

A. I was.

Q. When was that?

A. It was in June some time; probably the beginning of June; somewhere around there.

Q. Did you have any conversation with Hewes at all—any kind of conversation?

A. I went to collect a bill of C. N. Carter, and during the interim,

when I had nothing to do, I went over to several people that dealt with us. R. H. White & Co., Plumley, and Jordan, Marsh & Co., and I went into that department to see Hewes; told him confidentially what I was over for—to collect the claim of C. N. Carter & Co.

268 Q. Now, what took place between you and Hewes in regard to Jordan, Marsh & Co.?

A. Nothing further than that.

Q. You were telling him what your business was in Boston?

A. That is all.

Q. You paid him an ordinary visit?

A. Yes, sir; like the other houses.

Q. Here is another conversation he testified to:

"Q. Do you remember any other conversation with him?

"A. No; I had very little conversation with Julius Schutz on that subject. I remember that day, though. I told him I had passed some bills, and he wanted to know how he should fix his books. I told him I would give him the original dates and he could fix his books as he saw fit."

Was any such thing said?

A. No; now that my memory is refreshed, it was July 8th. It was warm weather—July 8th, 1885.

Q. That was the day you were up there?

A. That was the day I was in Boston.

Q. Did he tell you he would give you the original dates and you could fix your books as you saw fit?

A. No, sir.

Q. Did he give you any original dates?

A. No, sir. There is one thing I should like to rectify.

Q. Rectify it.

A. I stated to Mr. Hewes, at the time when I was over there, we can use money now, and he should see that the house send us a good-sized check, as he promised it would be fixed up previous to going to Europe, as he said he anticipated going to Europe. He said he would fix up our entire account previous to his leaving. He said he had been down to see the book-keeper, and that

269 they had sent us a remittance. I believe they had sent it.

Q. Did you go in there for the purpose of collecting?

A. Oh, no. In the course of the conversation I told him, "I can use money now."

Q. You had been asking for money all along, hadn't you?

A. All along.

Q. After the first six months of the dealing and down along through?

A. Yes, sir.

Q. And the orders kept coming in all the time while the promises to pay were being made?

A. Yes, sir. I never gave any authority to Mott, our book-keeper, to give any blank-dated bills, and never heard of it until after this disclosure. Mr. Mott never told me that he had sent any of these bills

to Hewes. I know about the remittance sheets of July 1st and 9th. I had no knowledge of the incorrectness of the dates on the remittance sheets. I knew the fact that the remittance sheets were sent with a check enclosed. I received it in the mail and handed it to the book-keeper and made a memorandum of the amount on the face of the remittance. Every mail that contains money is turned over to the book-keeper. I never knew of any request not to send any statements to the firm, nor had any reason to suspect that the fact of the purchases of those goods were concealed from the house.

Cross-examined by defendants' counsel:

I looked at the account of Jordan, Marsh & Co. in the ledger from time to time, and I know of my own knowledge that on several occasions statements were sent to them.

Q. When was it that you first heard rumors of Hewes' irregularities?

270 A. After the 24th of August—after we had sent them a long statement of their entire account that they owed us.

Q. When you sent that statement with the letter of August 24th—you wrote that letter, didn't you?

A. I did.

Q. You had not then heard of any of Hewes' irregularities?

A. I did not.

Q. You are certain of that?

A. I am sure of that. The only thing I had seen previous was that letter to Mr. Blath; that is the only time I know of.

Q. You recall now that you had seen the letter to Mr. Blath?

A. That letter—yes, sir.

Q. That didn't lead you to think anything was wrong?

A. Nothing further until after Mr. Blath went over and we had sent our statement over there, and there was no answer—no remittance on our statement that we had sent.

Q. Do you still say that when you wrote the letter of August 24th you had no idea that Hewes was crooked?

A. No idea regarding our affairs.

Q. Didn't the letter that he wrote to Mr. Blath on the 7th of August tell you that he had been crooked about your affairs?

A. I could not understand the tone of Mr. Hewes' letter.

Q. You saw it when it came?

A. After Mr. Blath had opened the letter and handed it to me—let me read it—that is the first time I saw it.

Q. You did not even suspect that Mr. Hewes was crooked on your account?

A. Not with our account.

Q. Even when you got this letter?

A. Even when we got this letter.

Q. What do you think he meant by this: "I have passed

271 all bills into the hands of the firm with the exception of yours?"

—. I don't know what he meant by that.

Q. What do you think he meant?

A. I could not think anything at all. I didn't know what he meant. I could not get the understanding of that letter. It was, as much as I knew, that our bills were in the office.

Q. Didn't he say in that letter that he had passed all bills except yours?

A. I didn't take any stock in that letter. I couldn't make out what it meant.

Q. What did you think he meant by this: "I would have put yours in, but I saw trouble ahead for the others, and big trouble at that?"

A. I didn't know what he meant by his letter. I couldn't make anything of it.

Q. And you mean to tell these gentlemen that on the receipt of this letter your suspicion was not even aroused?

A. Not aroused, probably, at all. I couldn't make out the letter. I did not know that Hewes was in trouble with his firm in July.

Q. Don't you know that it was rumored around in June already that he was in trouble?

A. No, sir. I was in Boston on the 8th of July, and I never heard a word or syllable of it.

Q. Didn't he tell you when you were there on the 8th?

A. No, sir; not a syllable.

Q. You did not even then learn that he had confessed a portion of his wrong to the firm as early as the 3rd of July?

A. Never a syllable.

Q. Didn't you hear Mr. Blath say that he and his partner, including yourself, were in conference after the receipt of
272 Hewes' letter of August 7th—after he got back from Boston?

A. We were not in conference on Mr. Hewes' letter; I never had any conference on Mr. Hewes' letter. I was there on the 8th of July, but Mr. Hewes did not tell me anything about it nor did I hear anything about it. I never heard anything that reflected on the integrity of Mr. Hewes prior to the 24th of August, outside of the letter that he sent Mr. Blath, whether it concerned our firm or others.

Q. When was it you first did hear anything that reflected on his integrity, and from whom did you hear it?

A. The first time after the disclosure.

Q. Who was the person that told you?

A. I heard it all over, from a dozen different mouths.

Q. You heard Mr. Blath say that he heard it from Mr. Schwab in July?

A. Yes, sir.

Q. Didn't he tell you about it?

A. He did not. If he heard it then he never told me anything about it. If he told me in July I would have known something of it on the 8th.

Q. You saw Hewes on the 8th, didn't you?

A. On the 8th or 9th, one of the two.

Q. When did you next see Mr. Hewes, and where?

A. I didn't see Mr. Hewes until long after the trial started. I mean after the disclosure.

Q. Three or four months?

A. Yes, sir.

Q. Don't you know very well that you saw him and were in close communication with him during the entire month of July?

A. No, sir.

273 Q. And during the month of August?

A. No, sir.

Q. And that he was trying to shield and save your firm?

A. No, sir.

Q. You didn't see him in July?

A. July 8th I saw him.

Q. And you didn't see — again in July?

A. I don't think I did.

Q. And you didn't see him in August?

A. I don't think I did. I think I am quite sure I did not see him.

Q. Didn't you see him on the 15th of July?

A. I don't think I did.

Q. Will you say you didn't?

A. As much as I can say, I will say I didn't.

Q. Didn't you see him on the 16th of July?

A. No, sir.

Q. Did you call for him at the Westminster Hotel on the 16th of July?

A. Not to my knowledge. I don't think I did. Still I won't say sure, but I don't think I did; as far as my memory goes, I don't think I did.

Q. Didn't you spend some time with him at that hotel on that day?

A. No, sir; I never spent more than a supper, sitting there to supper together, and from there we went to the theater.

Q. Didn't he go with you from that hotel to your office?

A. No, sir.

Q. Didn't he remain in your office over four hours on that occasion?

A. He was once in the office, but whether it was the 16th of July I cannot state.

Q. Didn't you keep him in your office and have dinner sent in there?

A. I don't know if it was the 16th of July if I did that;

274 I do that very often. Hewes was once in our office previous; I think on the 8th of July.

Q. Didn't you spend the whole day together, and in the evening go to the Bijou Theatre that night?

A. I may have been with Mr. Hewes at the Westminster one night and from there have gone to the theatre. It may have been the 16th, but I doubt it. I can't fix the date in my mind. It may have been before the 8th of July.

Q. Don't you know very well that you partners were all together on the 16th of July and spent four hours and a half by the watch

in your office consulting how to get out of the dilemma with John Hewes?

A. No, sir. The three partners were staying there and showing Hewes and the ladies our winter samples, which occupied a great portion of our morning. It was very warm weather; it was fearfully hot; and not to go out and delay so that we could continue to show Hewes our samples, we sent to the restaurant to send in a lunch, and after that we showed more samples. Then I said to Hewes, "Hewes, we will go down to the island." I showed him our entire line of things—fall samples for the following season—which took several hours. He passed his opinion on those samples. We considered the judgment of Hewes very good; at least I did when I was with Robertson there showing him our previous samples.

Q. Then you went to Coney Island?

A. Yes; about half past three or four o'clock, and stayed until about eight, so that Hewes could go back to Boston that night.

275 Q. Who wrote the letter of August 24th and of August 26th?

A. I did.

Q. Both of them?

A. I did.

Q. At that time you knew that at least three statements had been sent to Jordan, Marsh & Co., didn't you?

A. Yes.

Q. Now, why didn't you say so in the letter?

A. That three statements had been sent? They didn't ask for that. They asked for a statement of their account to date.

Q. Now, on the 25th of August Jordan, Marsh & Co. answered that letter, didn't they?

A. Yes, sir.

Q. And you answered it?

A. I did.

Q. You personally wrote the answer?

A. I personally wrote the answer.

Q. Explain to these gentlemen how it is, with that accusation before you, if you then knew that three statements had previously been sent by your firm directly to the office of Jordan, Marsh & Co., why didn't you mention that in your answer?

A. That was no request from Jordan, Marsh & Co. to make any remarks on what we had sent them before.

Q. You said you were accused of not having made known to them your demand?

A. Yes, sir.

Q. And you say you had made known your demand?

A. Yes, sir.

Q. And you knew it?

A. I am positive of it.

Q. When you came to reply to them why didn't you say so at that time?

A. I didn't think it necessary. I replied to their request. They sent us a check for a thousand or twelve hundred dollars.

276 Q. Did your firm want money in the month of June, 1885?

A. At times; yes, sir.

Q. And you yourself signed a number of telegrams sent to Hewes in that month?

A. Yes.

Q. Had you ever before that telegraphed him for money?

A. I think I had written him and sent him tags.

Q. Don't you know that never before the month of June you telegraphed for money?

A. There was no occasion. Mr. Robertson was told to request Mr. Hewes that the house should send us a check, and in each instance it was communicated to Hewes, and at times we received remittances.

The remittance of August 7th is entered on our cash book as having been received on the 10th of August. I cannot say, however, whether it was received the day before or not. I could not tell you that the red-letter remittance sheet was received until after the receipt of Hewes' letter of August 7th. I see that there are entries in the cash book in the handwriting of Mr. Mott on the 10th, 11th, 12th, 13th, 14th, 15th, 16th, 18th, 18th, 20th, 21st, and 22nd of August.

By Mr. BLUMENSTIEL: It does not follow that because there are entries of those days that they are made on that day.

Mr. Mott was the only person who wrote in that book, and in his absence we kept memorandum on separate pieces of paper, and then when he returned it was his duty to go over and enter them himself.

AARON H. SCHUTZ, called for the plaintiffs, sworn and examined, testified that he is one of the firm of plaintiffs. I know
277 nothing about the details of Jordan, Marsh & Co. with reference to the receipt of invoices, the disposition of invoices, the receipt of goods, etc., generally. I have heard the testimony in this case on that subject, and I never knew anything of these details. I know of the sale and shipment of these goods and the sending of the invoices. I had no reason to believe, until after the trouble arose, that the goods were not received by the house and that the bills that were mailed were not received by the defendants' firm, nor did I have any reason to believe that the goods which were sold by us were smuggled into the department without the knowledge of the members of the firm or that the invoices and bills were purloined and kept by Mr. Hewes. I had no knowledge of any kind of the alleged arrangement between Mr. Hewes and Mr. Robertson as testified to by Mr. Hewes. I had no information in any shape or manner on that subject. I first discovered that it was claimed that the goods which we sent were smuggled into the department without the knowledge of the members of the firm of Jordan, Marsh & Co. some time after the receipt of the last remittance sheet. I attend exclusively to the manufacturing portion of

our business; have nothing to do with the office part. I know nothing about the sending or the giving of blank-dated bills or about the errors in the matter of dates in the remittance sheets or the allowances therein referred to or the request of Mr. Hewes, as claimed by him, not to send statements. I heard of the alleged irregularities on the part of Hewes some time after the last remittance sheet—the red-letter one—was received. Part of it I must have heard about Christmas. I never heard of blank-dated
278 bills until after that. I had no discussion with my partners about this irregularity of Hewes in the month of July or in the month of August. I think I had in September. I cannot tell how many conversations I had about it. The occasion of the discussion was some correspondence between our house and Jordan, Marsh & Co. That was, perhaps, four or five weeks after the red-letter remittance sheet. I saw Mr. Hewes when he came into our office to look at our fall goods. I don't know when it was. I am the senior member of the firm. The capital of myself and my brothers are about equal.

Defendants called as a witness WILLIAM H. WARNER, a detective, who testified: I am a detective and know John Hewes and Mr. Julius Schutz by sight, and was appointed by Jordan, Marsh & Co. to shadow Mr. Hewes. I commenced July 13th, 1885, and came over to New York with him on the 15th, he not knowing it. Julius Schutz met him at the Westminster Hotel at 7 p. m. — 8 o'clock on July 16th. Hewes had arrived that morning. They went together from the Westminster to the Gilsey House; then they went to the Bijou Theatre. After the theatre was over they went to Delmonico's and had supper, and I dropped them about twelve o'clock that night. Mr. Hewes went to 356 Broadway the next day about quarter to twelve in the forenoon, at the plaintiffs' store, and met Mr. Julius Schutz. They went upstairs together and stopped there all the afternoon until about quarter to five, when they took a carriage and drove down Broadway towards the Battery.

Whereupon defendants rest.

279 Counsel for the plaintiffs renews his motion to direct a verdict for the plaintiffs upon the grounds stated at the close of defendants' case, and on the further ground that it now stands undisputed on the evidence that there was no such conspiracy, collusion, or arrangement between Mr. Hewes and the plaintiffs as is set up in the answer, and counsel also moves to amend the complaint by adding to it a count for money had and received to the same amount as is claimed in the account for goods sold and delivered.

Both motions denied, and exception taken.

JULIUS SCHUTZ, one of the plaintiffs, recalled and examined for the plaintiffs, testifies:

Q. Look at this paper and state whether that is the telegram referred to in your testimony of yesterday.

A. That is the telegram that I referred to yesterday in my testimony.

BOSTON, *June 19th*, 1885.

Schutz Bros. & Blath:

Please don't get impatient; will fix the thing at once.

JORDAN, MARSH & CO.

Telegram offered in evidence.

Cross-examined by defendants' counsel:

Q. This is the blank delivered to you?

A. This is the original telegram that I received myself.

Q. But you don't mean to say that it is signed by Jordan, Marsh & Co.?

A. I don't mean to say that. I know it is right, because it was delivered by the telegraph company here.

280 Counsel sum up, and thereupon the court charged the jury as follows:

It is probably not necessary, gentlemen, that I should say to you that in the trial of this case we have nothing whatever to do with any religious question of any sort. We are to try the case on the evidence, and you are to render such a verdict as is proved by the evidence.

The meaning of the word verdict is a true saying. The jury when they return a verdict say what the truth is as between the parties; that is all you have to do.

Whether the plaintiffs are of one nationality or religion and the defendants of another, or anything of that sort, we have no concern whatever about. You are to weigh this evidence and decide the case upon the law and the weight of the evidence as you may find it to be.

Now, the plaintiffs have brought suit against the defendants for this amount of goods sold and delivered. In their complaint they say they have sold and delivered goods to the defendants which the defendants have not paid for, and the plaintiffs want to recover for those goods.

Now, the question is whether on proof they have made out their case—that is, whether they have made out that they sold and delivered those goods to the defendants. If they have sold and delivered them to the defendants at these prices, then they are entitled to a verdict; if they have not they are not. That is the very question which we are to try; not whether they might recover in some other action or suit, but whether they can recover in this action.

281 The plaintiffs don't undertake to recover for any goods sold by anybody but Mr. Robertson acting for them. No one of the plaintiffs made any bargain with the defendants for any of these goods. All that was done about it in behalf of the plaintiffs was done by Mr. Robertson, so that this sale of goods, if there was any, and in any transaction concerning it, Mr. Robertson represented the

plaintiffs. What he did, what he said, of what he was informed, what he knew about that, in the course of that business, was the same as if the plaintiffs themselves did and said and knew it, so far as this question of sale is concerned.

Now, the defendants had this cloak and suit department in their establishment in Boston. In that department Mr. Hewes was chief. He had full control and ample authority to buy or sell in the due course of their business. There is no question about that—no question in the case—but that whatever Mr. Hewes did, acting for the defendants in the course of his authority in that department, binds them. His authority was ample.

Now, if, acting for the defendants in pursuance of his authority from them in charge of this department, he bargained for these goods with Mr. Robertson, as Mr. Robertsou says he did, in the course of his employment, in pursuance of his authority from the defendants, then the plaintiffs are entitled to recover for all these goods.

If he did act in ordering these goods with Mr. Robertson, of the plaintiffs, in pursuance of his authority and under it, meaning to buy these goods in the usual course of business in his department, then he was authorized to do it, and the plaintiffs are entitled to a verdict for the amount of these goods; that amount is $32,604.99; the interest on it is $3,443.69, making a total of $36,048.68.

282 The plaintiffs are entitled to a verdict for that amount if Mr. Hewes in the transactions with Mr. Robertson was acting in pursuance of and according to his authority from the defendants in charge of that department of suits and cloaks in the defendants' store. If he was acting as Mr. Robertson says, then the plaintiffs are entitled to that amount.

There is a further question, however, and the main question, which is whether he was acting in pursuance of his authority from the defendants or against it.

If he took advantage of his place as agent for the defendants in charge of that department to deceive them as to getting goods into that department, and got goods into that department which they didn't know of and he didn't intend they should, and which he knew was against the defendants' authority, and the plaintiffs, through Mr. Robertson, availed themselves of that, taking advantage of his being in his place there, of this willingness, of his faithlessness to the defendants, to get their goods into the defendants' establishment without their being bought in the usual course and in pursuance of his authority, but against what Hewes and the plaintiffs knew to be their wishes—if that was done, and those goods were got in there in that way, then they were not sold to Mr. Hewes acting under and by virtue of his authority from defendants, but to Hewes acting against their authority, against what he understood to be defendants' wishes, not acting for them, but against them. If he did that, and the plaintiffs knew of that, and availed themselves of his faithlessness to the defendants for the purpose of getting their goods into the defendants' establishment without having them

bought in due course, then it was no sale, and the plaintiffs
283 are not entitled to recover in this case except as I desire to have you notice hereafter.

If one of the plaintiffs had left some cloaks and suits in the defendants' establishment, intending that the defendants, by their clerks, should sell these goods and not know but what they were goods they had bought, that would be no sale, although they did sell them and had the money, or they sold part of them and had some of them left.

If Mr. Blath or one of the Messrs. Schutz had himself gone in there and unobserved left some cloaks or suits on purpose to have the defendants' clerks sell them to get the money into their hands for the purpose of claiming the price of them, when that was done that wouldn't be any sale from the plaintiffs to the defendants. That is plain enough; and when the defendants had got the money for those goods the plaintiffs could not maintain suit for it without first asking them to return the goods, nor for any goods that were so left without first asking them to return the goods. They could not do that themselves; neither could they get Mr. Hewes if he would and was willing to take the goods into that establishment without the defendants' knowledge and have the defendants' clerks sell them to the defendants' customers and get the money and charge the defendants with the price of the goods and call that a sale. That would be no sale.

Now, the very question in this case as to the principal part of these goods is whether that was what was done, whether Mr. Hewes and Mr. Robertson for the plaintiffs or the plaintiffs themselves took advantage of Mr. Hewes' place to get their goods into the defendants' establishment without the defendants knowing about it for
284 the purpose of having the defendants' clerks and agents there sell the goods and get the money into their hands without their being aware of it all, and then have Mr. Hewes pay the plaintiffs for the goods by passing the bills when he could make them go through when the sales would warrant it without exposing him.

If that was it, you see that was not a sale of goods to the defendants. It wasn't anything they bought of their own will themselves; it wasn't what they expected Mr. Hewes to do; it was not what the plaintiffs would expect Mr. Hewes to do for the defendants. That would not be a sale.

In that case the plaintiffs' goods would get into that store; would get turned into money; the money would be there; the plaintiffs probably would not lose their goods, but they could not sue for them as for goods sold. They would have to make a claim the other way—that is, make a claim for the money. If they brought a suit of that sort when it came up to be tried there would be various considerations about that case, as to how much they would be entitled to recover, as to how much the defendants would be entitled to deduct by having their clerks make the sale, and having the capital and the store and the material and all that used for that purpose, more than we are called upon to adjust.

We have nothing to do with that excepting to find out whether

there was a sale of these goods to the defendants or not. If there was, the plaintiffs are entitled to recover; if there was not, the defendants are entitled to a verdict in this case as to the principal part of these goods, and the plaintiffs must look to such remedy
285 as they have to preserve their rights which the law will give them after taking the course they did.

We ought to remember in looking at that subject that whatever Mr. Hewes did there that was not communicated to the plaintiffs or to Mr. Robertson and they didn't act upon binds the defendants and not the plaintiffs—that is, it matters not how much Mr. Hewes cheated the defendants if the plaintiffs did not concur with him in doing that. If they did not know that he was cheating the defendants and act with him and take advantage of his cheating to get their goods into the defendants' establishment, then the defendants have themselves, or Mr. Hewes as their agent, to blame, not the plaintiffs, unless the plaintiffs either by themselves or Mr. Robertson knew of that. The fact that Mr. Hewes cheated the defendants is no defense to this claim.

So that in order to defeat the plaintiffs' claim it must appear not only that Mr. Hewes did take advantage of his place to get these goods into the defendants' establishment without the defendants knowing it for the purpose of concealing the whole transaction from them, but that the plaintiffs or Mr. Robertson knew of that and concurred in it and acted with him to cheat the defendants in that way. If it amounts to that, then that is a good defense as to the main part of this; if it does not amount to that, then it is no defense as to any of it.

So the principal question in the case is as to the transaction of making these sales by Mr. Robertson, acting for the plaintiffs, to Mr. Hewes, acting for the defendants. If it was in the usual
286 course, the ordinary way, Mr. Hewes acting by virtue of his authority, Mr. Robertson supposing that he did, then the plaintiffs are entitled to recover for the whole; but if it was not that, if Mr. Hewes was acting contrary to his authority—contrary to what he knew was his authority—was not buying the goods for the purpose of carrying out the defendants' wishes, but for the purpose of acting against their wishes, for the purpose of getting these goods into their store against what he knew to be their wishes, and having them sold—if Mr. Robertson knew that and acted upon it, concurred in it, to get those goods in there and not let the defendants have the privilege of controlling their own business, buying what they wanted to buy, but for the purpose of getting those goods in there as if they were bought without their knowledge, and having their clerks sell them and turn them into money, and then getting their pay through Mr. Hewes by his passing the bills and getting their paymaster to pay them—if that was it, it was no sale.

Right here is where the principal difference between these parties to this case lies. If it was as the plaintiffs say it was, they are entitled to a verdict. If it was as Mr. Hewes says it was—and it goes to that length; there is a little controversy as to what he meant by what he has said, but if it goes to that length—that he was get-

ting those goods in there knowing that the defendants did not want to buy them and would not buy them, and without really buying them, but letting the plaintiffs send them in there without a purchase, in the ordinary course, but with the understanding that they were to be kept there without the defendants' knowledge and sold by
287 their clerks, turned into money, and then the money got back to the plaintiffs by Hewes passing the bills without the defendants really knowing that they were doing business with these goods, then that is a defense. That is the principal question which you have to try.

There is one item to which this defense does not apply, the item of goods of July 30th, 1885; and as to that, as I remember from the evidence, the goods were sent and a bill for the goods *were* sent. The defendants claim they were ordered in the same way as the other goods, but the goods were sent and came to the defendants' store, and the bill of the goods, as goods sold by the plaintiffs to the defendants, came to the defendants' store; so that they knew that the plaintiffs understood that there was a sale of this bill of goods, and that the goods had come and they were received and disposed of.

As to that bill of goods, I see no reason why the plaintiffs are not entitled to recover the full amount of those goods. The bill is $108.75. I have computed the interest on it up to Saturday, which brings it up to $117.77.

If you find the plaintiffs entitled to recover for the whole amount of these goods—that is, $36,048.68—that will include this sum. If they are entitled to a verdict for the whole amount, then you will return a verdict for that amount. If you find that they are not entitled to recover for the remainder of the goods, still you must return a verdict for the plaintiffs for the amount of this item, $117.77.

288 As bearing upon this principal question, as to how Mr. Hewes and Mr. Robertson understood and arranged about getting these goods into the defendants' store, you have the testimony of Mr. Hewes, you have the testimony of Mr. Robertson, the testimony of the plaintiffs themselves, the testimony of Mr. Jordan, and all these documents, and the entries in the books and all the circumstances of the case.

All that is to be weighed by you, and to be considered in view of what you believe the real truth was, having seen the witnesses on the stand and heard their testimony and observed their manner. Take the whole into account—all the evidence on both sides, the one as well as the other, not the evidence on one side to the exclusion of the other—take the whole proceeding from beginning to end, as it has been detailed to you by the witnesses, as you believe them, and all of them, then say, on the whole, what you think about it.

You noticed Mr. Hewes on the stand and heard what he said about his course of proceeding, about his deceiving the plaintiffs, about his falsifying in regard to it. His testimony is to be
289 weighed for exactly what you think it is worth, in view of all that, after hearing what he said about it, about his course of

procedure; what he did; about how he says he falsified and deceived the defendants, and about what occurred afterwards. Take it all together and give his story just as much weight as you think is just to him and fair to all the parties concerned, not any more and not anything less.

So the testimony of all the plaintiffs and of Mr. Jordan, the defendant, who has testified here. You are to give weight to their testimony just as you think it is worth, in view of the interest they have in the result of the case and as they have manifested it here on the trial. And so of Mr. Bassett. He said he had interest in the result of this trial on account of the honor of the house. You see the plaintiffs have an interest on account of maintaining their suit, and their book-keeper, as he has testified, and all these witnesses are interested more or less to maintain their side of the case—that is, the side on which you can see they are interested.

You should weigh their testimony in view of their interest and look at the whole in view of the course of procedure. As to what information was conveyed by the plaintiffs to the defendants, and whether it was received by the defendants, and as to their communicating with Mr. Hewes instead of the defendants, if they did, as to their letting the bills lie a long time after they became due or after they would become due, if the defendants chose to pay them, take it all into account, look at the whole of it, and say on the whole what you think about this.

290 If you believe that Mr. Hewes really acted, in all that he did by virtue of his authority, for the defendants and bought these goods in due course, as Mr. Robertson and the plaintiffs now allege and say, then, as I have remarked to you several times before, your verdict must be for the plaintiffs.

But if you believe otherwise and think that they took advantage of Mr. Hewes' faithlessness to the defendants to get these goods into their store and have them converted into money and not have the defendants know it, and that they succeeded in that, deceived the defendants, intending to deceive them so they should not know it, and get the goods into their establishment and converted into money in their hands without having them know it, making them carry on that business without their being willing to, then you must return a verdict for the defendants unless you find one other thing, which I will now state to you. It is this:

It is said, and I think it appears in the testimony, that about $250,00- worth of goods came into the defendants' establishment, probably, and were not entered on the defendants' books at all. Not only this $32,000 in amount of goods, which the plaintiffs sent were there, but over $200,000 worth from other parties, which went into this store and into this department.

It is said on behalf of the plaintiffs that the defendants ought to have known and must have known, when so many goods came into their establishment and went into this department, that more goods were coming than their books showed, that more goods were

291 bought than were reported to them; the plaintiffs say they must have known that.

If you think so; if you think that couldn't have happened, couldn't have been got along with, in view of the testimony of Mr. Hewes, Mr. Jordan, and Mr. Bassett as to how things were managed, if you think that couldn't have been done without the defendants knowing that goods were being bought which were not reported to them; so that as prudent men, paying attention to their own affairs, they must have known that goods were getting in there of which no account was given to them; so that they ought to have inquired and seen where they were coming from and found out about it, and so that you can see from the whole that they must have found out about it, must have understood that there were goods coming in that way—if you think that, then you will be justified in assuming from that that they did have notice of it or would have found out if they had inquired. If after that they let these goods come in in that way, and let their clerks sell them, they are bound by it as if they had bought them in the first place. But you must, in order to find that fact that way, be satisfied from it, in view of the whole situation, taking into consideration all the evidence in the case, you must be satisfied they must have known it; that it couldn't have been done in the way they say it was done without their knowing it.

Mr. Jordan has testified that they didn't find out about it, and you have heard the evidence where he was and where the other partners were. Mr. Hewes has testified as to his keeping it from them and what success he had. Mr. Bassett and Mr. Gard-
292 ham and some of the other employees of the defendants have testified as to their not knowing about it.

Still, you are at liberty, on the whole, to weigh the whole evidence, the large quantity of goods, and say whether it shows to you fairly that the defendants must have known when these goods were coming in that more were coming in than their books showed were bought; that they themselves must have known that they were taking and disposing of goods which came from somewhere or somebody which were not reported to them and entered on their books.

If it comes to that, so that you are fairly satisfied that was the case, that they must have known that, then you will give effect to that, and you will give effect to that in this way: that when they must have found that out in that way and still kept on selling the goods and taking the money and putting it with their money they knew that they were taking goods that somebody had sold, and they must be treated now as having bought them. If you are satisfied of that, then you must return a verdict for the plaintiffs for the amount of the goods.

I have been requested to instruct you as to the burden of proof.

As to that I can only say that the burden of proof is on the plaintiffs to make out their case and make it out all the way through—that is, in the first place, they must show you that these goods were sold in the usual course to Mr. Hewes, acting for the defendants; but if they fail in that, it is for them to satisfy you that this quantity of goods was so large that the defendants must have
293 known about it and ratified it by going right along and selling after they had found out about it—that is, it is on the plaintiffs to make out their case.

The fact that the goods got into the establishment of the defendants or that the goods were received by the carrier which the defendants authorized to take the goods here in New York is made out; there is no question about that; no question in the case but what the plaintiffs parted with their goods, or that they got where the defendants are liable for them if they bought them; there is no question about that. If they make out that the defendants did buy them, then the defendants had the goods and are liable for them.

But that the bargain was a bargain for the sale of these goods to Mr. Hewes in the usual course of business it is for the plaintiffs to make out further, and if they do not make that out, that the defendants ought to have known that they were receiving these goods is to be made out by the plaintiffs.

In the course of the trial there have been put in evidence the fact, testified to by witnesses on the part of the plaintiffs, that some letters, some containing statements and some other letters, I think, were mailed here in New York. The defendants, Mr. Jordan, who has testified, and their clerk who has charge of the receipt of their correspondence, Mr. Bassett, and some others have testified tending to show that the letters were not received.

The fact the plaintiffs mailed such letters, whether the defendants received them or not, bears upon the question as to the con-
294 duct of the plaintiffs and their good faith in this transaction. It does not affect the defendants unless they received the letters. The fact that a letter is mailed does not in court establish the fact that the person it is mailed to received it. That is not proof of that fact. In certain transactions about protesting notes and charging endorsers of commercial paper and things of that sort the mere fact of mailing a letter answers; but when a party is to be affected with knowledge of what is in the letter and the contents of it, and what goes with it, they must go further and prove not only that it was mailed, but that the party to whom it was addressed got it.

Now, as I said, the fact that a letter was mailed by the plaintiff would have a bearing as showing how they understood the matter and how they were acting in regard to it; but unless the proof shows that the defendants got the letter and what was with it, it does not affect them in their conduct with it.

I am not aware that there is anything further that I ought to call your attention to in order to have you decide this case properly and justly as between these parties. You have the evidence from the beginning to end, and it has taken a good while to lay it before you. You have heard the comments of counsel upon it, which are always to be weighed so far as they are founded upon the evidence, and not any further. Then we sat down after hearing the whole and the comments of counsel, and come right back carefully and dispassionately and candidly to it, with a desire to do exact justice to both parties, not caring for one more than for the other. The con-
295 sequences of our conduct we have nothing whatever to do with, except to be sure to be right, not to be wrong. All

the anxiety we need to have about the matter is to be right—to do justice between these parties.

And it will be justice between these parties to find a verdict for the plaintiffs for the whole of this amount if Mr. Hewes, in making these purchases, acted in accordance with his authority. It will be in accordance with justice, if he did not do that, to give the plaintiffs this small item of $117.77. It will be in accordance with justice not to give the plaintiffs any more if they, for the purpose of deceiving and cheating the defendants into having goods taken into their establishment and sold without their knowledge and consent, worked together with Mr. Hewes to bring that about, and did deceive them and actually got these goods into the defendants' establishment for that purpose without the defendants or any others acting for them, except Mr. Hewes, knowing anything about it. If they succeeded in doing that, got their goods into the defendants' establishment in that way, then they ought not to recover for the goods as sold and delivered, but ought to be left to such rights as the law accords to them for the value of their goods, what they brought, just as it may be adjusted in some other case with respect to that. Nothing less than that would cut them off from the right to recover the full amount for their goods.

A JUROR: Your honor, you allude to other parties being somewhat in the same condition. I wish to know whether we are allowed to take into consideration the acts of those parties that do not appear in the evidence.

296 The COURT: We have nothing to do with any case except this one on trial. In the course of the trial of this case it has come out from witnesses that besides this quantity of goods which came from these plaintiffs that went into the defendants' establishment there were great quantities which also went in there and didn't go on the defendants' books.

When you are considering the question as to whether the defendants ought to have known there were more goods there than appeared on their books, then you may consider for that purpose only that there were other goods in large quantities besides these.

A JUROR: The question I ask is whether we are bound to consider that state of things.

The COURT: On that point you are to take the evidence just as we have it here.

Mr. CHOATE: In respect to that I ask your honor to charge that the jury are not to consider what other parties may have done with a view or in respect to sales through him; that the only question for them to determine in this case is whether these plaintiffs' sales to Hewes was fair.

The COURT: That is just what I meant to tell the jury. What transpired between Hewes and any other persons who sold to them we don't know. There is no evidence about that. We have simply this—and I think it came from Mr. Bassett and perhaps Mr. Jordan too—that there was a large quantity of goods that didn't appear on their books besides these. That is all there is to that. Whether they were cheated into having them in there without get-

ting them on their books, or whether it was done for that
297 purpose or anybody was to blame, we don't know anything about. We have nothing but the mere fact that there were goods in a considerable quantity along at this time that did not get into their books.

In looking to see whether the defendants are to blame for not knowing what was on their books, you are to look at the whole and see whether there was enough of those goods, notwithstanding what Mr. Hewes said he did, to make them know that goods were coming into their establishment as bought for which they had no account.

Mr. CHOATE: I ask your honor to instruct the jury that during the period of the proved absence of Mr. E. D. Jordan, from November 5th, 1884, to June 20th, 1885, his denials as to knowledge of sales and deliveries is to go for nothing, and that they are entitled to consider as of weight in determining their verdict the circumstances that his two sons, who were left in charge of the department, are not called upon the stand.

The COURT: Of course that is all sound. Mr. Jordan could not know what was going on in his establishment from his own knowledge when he had gone on a voyage around the world. Starting the day after the presidential election and being gone seven months and a half, which would bring it around to about the 20th of June, 1885, of course he didn't know anything about them during that time.

As to how the case is affected by his sons, the other partners, not being here—I am not clear whether they were partners then, before Mr. Marsh died, or not.

Mr. BLUMENSTIEL: Yes; they were partners.

298 The COURT: If they were, they are defendants in the case. The defendants could produce them here. You have heard all the reasons why they did not. Now, if they could produce them and did not, and you can see there is something which they might know and would know and could tell about, and they are not produced, why that is a circumstance that has a bearing upon the question involved in what they did know about. It doesn't actually prove what they could tell, but it bears upon the question of good faith of the party in not bringing all the evidence he could to bear on that subject. You cannot find a fact on what you suppose a witness might testify, but you may infer from not bringing the witness that what that witness would testify to the party does not care to show.

Mr. CHOATE: I ask your honor to charge, as to the matter of the receipt of letters and other communications proved to have been mailed by the plaintiffs to the defendants, that in the absence of proof from each defendant that such letters, etc., were not received by any one of them the mailing is *prima facie* evidence of the fact of receipt.

The COURT: Unless the other side prefer to have that so stated rather than to have an exception to it, I will leave that as I stated it, that the fact of mailing doesn't prove the fact of receipt.

Mr. CHOATE: What I ask is that the fact of mailing, in the absence of any denial by each one of the defendants of receipt, is *prima facie* evidence that it was received.

The COURT: I don't quite think that is the law.

Mr. CHOATE: Will your honor give me an exception?

The COURT: Yes, sir.

299 Mr. CHOATE: Then I ask your honor to charge that if after the defendants, as they themselves state, in August, 1885, obtained full knowledge of all the alleged facts they retained the proceeds of the goods already sold and the remaining goods from the plaintiffs that were left, then in that case the plaintiffs are entitled to a verdict for the full amount.

The COURT: Perhaps there should be one further explanation as to that. It does appear in evidence that after the defendants found out all about it there were some goods in their establishment which came from the plaintiffs, and the defendants' evidence tends to show that they could not tell whether they were goods bought and paid for or some of the goods in controversy.

Now, if the plaintiffs meant to get the goods in there and get them mixed in with the defendants' goods in that way they can gain no advantage from the fact that they were not so apart; so that it all turns on the question I gave you before, as to whether they did mean that.

Mr. CHOATE: Allow me to ask this request: That in respect to the goods sold and delivered between the 5th of November, 1884, and the 20th of June, 1885, the period of Mr. Jordan's absence, amounting to $23,338.68, and with interest to $27,033.80, the jury are not at liberty to find upon the mere denial of Mr. Jordan, in the absence of the evidence of the other defendants, that the firm had no knowledge of their purchase and receipt as they came.

The COURT: I will leave that just as I have stated.

Mr. CHOATE: I except to your honor's refusal to charge that.

300 The plaintiffs except as to what it calls the main question, whether Hewes was acting for or against the defendants' authority, as stated in the charge, the plaintiffs claiming that upon the evidence the court was bound to instruct the jury to find a verdict for the plaintiffs for the full amount.

The plaintiffs except to the alternative as charged, upon which the court instructed the jury that plaintiffs were not entitled to a verdict, viz: That if there was a design on the part of Hewes to get the goods in the possession of the defendants to be sold by their clerks without the knowledge of the defendants, and if the plaintiffs knew of it and availed of it to get their goods into the establishment, then there was no sale and plaintiffs are not entitled to recover.

The plaintiffs except to the charge that if plaintiffs had left goods for defendants' clerks to sell without defendants knowing it, then the subsequent sale and receipt and keeping of the money by defendants would not constitute a sale, and that there can be no recovery.

Plaintiffs except to the charge that if the defendants had got the money for the goods of the plaintiffs the plaintiffs could not get the

money on the facts in the case by suit without demand, or get the goods remaining without demand.

Plaintiffs except to the proposition that if they got Hewes to take the goods and charge defendants with them, then they cannot recover. As to the exact phraseology of the charge in the propositions to which I have taken exception, I am not positive, my
301 intention being to call the attention of the court to the parts to which we except.

The COURT: Certainly.

Mr. CHOATE: Plaintiffs except to that portion whether the plaintiffs took advantage to get their goods into the defendants' hands to be sold without their knowledge and for Hewes to pay for them when he could, in which case there would be no sale and no recovery. It was what plaintiffs expected Hewes to do for them and not what plaintiffs expected Hewes was authorized to do for them.

Plaintiffs except to the proposition in the charge that they would have to make a claim for money in the defendants' hands, and in such case on a claim for money in their hands that various questions would arise which are not here to be decided.

Plaintiffs except to the proposition that if there were no sale in the sense stated by the court the plaintiffs must look to other remedy than this.

I except on behalf of the plaintiffs to the proposition that if Robertson, without the knowledge of the plaintiffs, acted with Hewes to get plaintiffs' goods into the defendants' establishment without their knowledge and have the clerks of the defendants sell them and Hewes to give pay as he could, there was no sale.

I also except on behalf of the plaintiffs to the proposition that if it was in substance as Hewes says it is, then if as stated in the opinion or charge that would constitute a defense.

The plaintiffs except to each and every proposition of the charge as to the burden of the proof, and particularly to the charge
302 that the burden is on the plaintiff to make out that the sale was in the usual course, we claiming that the proof of the sale as a sale by the plaintiffs to the defendants' agent is complete, and that the burden of proof is on the defendants to show that there was any fraudulent collusion which would defeat the sale.

The plaintiffs except to the charge that the burden of proof is on the plaintiffs to show that the defendants ought to have known that defendants were receiving the goods.

The COURT: It is to the whole charge on the burden of proof?

Mr. CHOATE: The whole charge on the burden of proof.

And I except to the charge that the fact that the plaintiffs mailed the letter claimed to have been mailed, while it bears on the good faith of the plaintiffs, does not affect the defendants unless the letters were received.

I except to the charge that, although mailing of notice of protest of a note, for instance, is sufficient to charge a party who does not receive it, yet where a party is to be affected with the knowledge of

the contents of letters, as understood in this case, the plaintiffs must go further and show that the party to whom it was addressed got it.

We except to the final statement as made in the charge, that if Hewes did not act in accordance with the authority of defendants, if the plaintiffs for the purpose of cheating the defendants worked or colluded with Hewes to get the goods into defendants' establishment; to that we except.

Plaintiffs' counsel also except specifically as follows:

303 Plaintiffs' request No. 5 to the refusal of the court to charge this request except as charged.

Plaintiffs' request No. 6 to the refusal of the court to charge this request except as already charged.

Plaintiffs' request No. 7 to the refusal of the court to charge this request except as already charged.

The COURT: I gave the plaintiffs the benefit of a direction as to Hewes having ample authority.

Plaintiffs' request No. 14 to the refusal of the court to charge this request except as already charged.

Mr. CHOATE: We request the court to charge that the defendant, E. D. Jordan, having left this country the day following the election of Cleveland as President—November 5th, 1884—and remaining absent, as testified to my him, until June 20th, 1885, during which time most of the transactions in question arose, and as he could not have knowledge of those transactions, his denial of knowledge is not sufficient proof that the defendants or some of them did not have knowledge of the transactions in question. The refusal of the court to charge that I except to. Your honor told the jury—what you did tell them about it—that it would not be conclusive, but that they would have a right to consider it. Now, we claim that in the absence of any denial by the other defendants the absence of proof on the subject is proof of knowledge.

We ask the court to charge there is insufficient denial of knowledge of transactions during that period. That is the same thing in different form as the last one. To the refusal to charge that the plaintiffs except.

304 The COURT: You except to the denial upon these requests so far as they are not covered by the charge.

Mr. CHOATE: Then I ask the court to charge the jury that as to the goods testified to by the plaintiffs' witnesses to have been sold and delivered to the defendants during that period the jury must find a verdict for the plaintiffs, and during this period the proof of the plaintiffs is that the value of the goods sold was $23,338.66, for which the plaintiffs are entitled to recover, besides interest.

(This request the court refused to charge except as already charged, and plaintiffs except.)

Mr. CHOATE: I ask the court to charge that the reception into the defendants' establishment of the goods by Erlacher, as proved, there being no complaint of Erlacher's good faith to his employer, is

presumptive evidence of the knowledge by the defendants of their receipt.

(The court declines to charge as requested except so far as the point is covered already by the charge, and plaintiffs except.)

(The jury, having retired for deliberation at 2.35 p. m., at 3.35 p. m. returned to the court-room, having agreed upon a verdict.)

(The jury find for the plaintiffs, as directed by the court, for the last item of account, amounting, with interest, to $117.77, being the bill of July 30th, 1885, and a verdict for the defendants as to the residue of the plaintiffs' claim.)

305 Mr. BLUMENSTIEL: We ask the court to set aside the verdict, because the verdict is against the law and the evidence and against the weight of the evidence, and we ask for a new trial on the minutes and on the exceptions.

Plaintiffs' Requests. Questions of Law.

I.

It being shown by the evidence on the part of the plaintiffs that they sold to the defendants the merchandise referred to in the complaint at the prices there stated, and it being likewise shown that all the said goods were delivered to the defendants, the plaintiffs, in the absence of any affirmative defense being made out, are entitled to recover the full amount claimed.

II.

The burden of establishing the defense set up in the answer is upon the defendants, and, such defense being forwarded upon allegations of fraud and conspiracy, the same must be proven to the satisfaction of the jury.

III.

Fraud is never presumed. It must be proven by facts which warrant such an inference.

Mere suspicion is not sufficient, and if the acts of the party against whom fraud is charged are consistent with innocence, then proof of fraud is wanting.

IV.

306 Hewes was a general agent of the defendants, authorized by them to purchase goods for his department. No limit in figures was put upon the amount to his purchases; neither any restrictions as to from whom he should or should not buy. His authority in these respects was broad. In the absence of fraud on the part of the plaintiffs Hewes could purchase for the defendants as much goods as he pleased, and they would be liable therefor.

Hence to avoid any contract by him made with the plaintiffs it is necessary, under the issues in this case, to establish that the contracts were void for fraud, and the rule invoked in the preceding request is applicable.

V.

Even assuming that the sales were originally made with the fraudulent arrangement alleged by the defendants, yet if they, while such purchases were being made, knew that the plaintiffs were selling them goods, or were put on the inquiry by the surrounding circumstances, they must be held to have ratified the acts of Hewes and are liable for the purchase price.

The defendants are conclusively charged with knowledge as to whether goods knowingly received by them are being paid for, and if they had reason to believe by any information they had by the size of the stock in their premises, or for any other cause, that the goods on hand or the sales were beyond proportion to the communicated purchases, then the jury may find that they adopted the acts of Hewes in making such purchases.

(Refused except as charged. Exception by plaintiffs.

307

VI.

If either member of the defendants' firm knew that plaintiffs' goods were being received without their being paid for the knowledge of such defendant is the knowledge of all.

The mere fact that Eben D. Jordan testifies that he did not know of such goods being purchased is not conclusive or presumptive evidence that neither of the other defendants had such knowledge, particularly as from Nov. 5th, 1884, to June 20th, 1885, he was absent from this country.

The omission of the other two members of the firm — testify on behalf of the defendants in this respect should be considered most strongly against the defendants.

Where a party omits to call an available witness on a material matter the jury may properly infer that such failure to testify is due to the fact that if called he would testify adversely.

(Refused except as charged. Exception by pl'ffs.)

VII.

In the present case the failure of Eben D. Jordan, Jr., and of James C. Jordan to testify may be considered by the jury that such failure is because their testimony would not substantiate the defense of the defendants.

(Refused except as charged. Exception by pl'ffs.)

The failure, therefore, of the plaintiffs to call or summon them is in no sense to be construed disadvantageously against the plaintiffs, but if any presumption is to be drawn therefrom it is a pre-

308 sumption against the defendants.

The jury may infer from such omission of the other defendants to testify that if called they would have given evidence tending to overthrow the defense in this action, or that they would have been favorable to the plaintiffs.

VIII.

The jury should, in determining whether or not the defendants ratified the purchases from the plaintiffs, take into consideration the omission of the defendants to notify the plaintiffs of the fact of their having some of the goods on hand, and also the fact that they omitted to notify the plaintiffs to receive them back.

If the defendants wilfully and purposely closed their eyes or omitted to inquire in order not to see or become informed as to what Hewes was doing in the way of making purchases, and if because of such wilful omission and inaction on the part of the defendants they failed to obtain actual knowledge of the facts, then their ignorance affords no defense.

IX.

The mere omission of the defendants to enter the purchases in their books of account of itself cannot affect the right of the plaintiffs to recover.

309 *Plaintiffs' Requests. Questions of Fact.*

1.

In any view the plaintiffs are entitled to a verdict for $108.75, the cost of the goods purchased and received July 30th, 1885 (that being after the disclosure to the defendants of the acts of Hewes).

1¼.

That it appears from the plaintiffs' evidence that all the goods were shipped in the same way as that of July 30th.

1½.

There is no dispute upon the evidence that all the goods sued for in this action were received in the defendants' premises.

2.

There is no dispute upon the evidence that the proceeds of such goods were all received by defendants.

3.

That upon the evidence the sale of such goods on the whole resulted in a profit.

4.

That if the defendants were aware at any stage of their dealings referred to in the complaint that the plaintiffs were selling and shipping these goods to the defendants, then they are liable for the price.

5.

310 That if after discovery of the alleged fraud and complicity the defendants asserted ownership over any part of the property and retained the same, then such act amounts to a ratification sufficient in law to make the defendants liable.

Refused. Exception taken by plaintiffs.

6.

Retaining any portion of the property or proceeds thereof after knowledge of the circumstances under which the same was obtained amounts to a ratification.

7.

A party cannot retain the benefits of any acts of any agent after knowledge of the facts without being held to ratify the acts of the agent in that respect and of becoming liable therefor.

8.

The jury, in weighing the credibility of Mr. Hewes, have a right to take into consideration his interest, as shown by his having been retained in the pay of the defendants as well as by his subsequent partnership relation with Eben D. Jordan.

9.

In view of the conceded position of Hewes in defendants' employ, that he had a legal right to purchase of the plaintiffs and others for use in defendants' business, and if the plaintiffs in good faith delivered goods to the defendants upon orders from Hewes, they are entitled to recover.

311 10.

In the absence of fraud upon the part of the plaintiffs Hewes had the legal right to bind the defendants by purchasing goods for them.

11.

Even though Hewes and Jordan are not contradicted by any witness as to whether they had knowledge of the acts of Hewes in relation to the obtaining of goods from the plaintiffs, yet if by surrounding circumstances they are contradicted or the evidence of the acts of the parties show that the defendants must have known of the reception of the goods, then they are liable.

12.

The plaintiffs are not to be prejudiced by the acts and dealings of Hewes with other merchants who have been referred to in this case. It matters not how much other parties have defrauded the defendants or acted irregularly with Hewes.

13.

Merely failing to enforce or demand payment of goods while the parties are engaged in continuous dealings is not sufficient for the jury to find that there was no purchase or to deprive plaintiffs of their right to recover.

14.

Even if there was collusion between Hewes and Robertson the plaintiffs are entitled to recover, unless the jury is satisfied that the plaintiffs consented to or knowingly participated in such collusion.

Refused except as already charged. Exceptions by pl'ffs.

312

15.

The defendant, Eben D. Jordan, having left this country the day following the election of Mr. Cleveland as President, November 5th, 1884, and remaining absent, as testified to by him, until June 20th, 1885, during which time most of the transactions in question arose, and as he could not have knowledge of those transactions, his denial of knowledge is not sufficient proof that the defendants or some of them did not have knowledge of the transactions in question.

In the absence of denial by the other two defendants, James C. Jordan and Eben D. Jordan, Jr., there is insufficient denial of knowledge of transactions during that period.

That as to the goods testified to by plaintiffs' witnesses to have been sold and delivered to the defendants during that period the jury must find a verdict for the plaintiffs, and during this period the proof of the plaintiffs is that the value of the goods sold was $23,338.66, for which the plaintiffs are entitled to recover, besides interest.

313 DEF'TS' EXHIBIT "A A."

All claims to be made within five days after receipts of goods.

Fol. 304. NEW YORK, *June 28th*, 1885.

Messrs. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers and manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin Sts.

P. O. box 3191.
Terms, 7–10.

		(Blue pencil:)		
560	25 silk	14	9.75	243.75

(Red ink:)
360.00

(Red ink:)
106.25
(23)

(Blue pencil:)
One
Hewes.
C. & B.

314 DEF'TS' EXHIBIT B B.

All claims to be made within five days after receipt of goods.

Fol. 343. NEW YORK, *July 6th*, 1885.

Mess. Jordan, Marsh & Co. bought of Schutz Br's & Blath, importers and manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin Sts.

P. O. box 3191.

Terms, 7%–10.

			(Red ink:)	(Blue pencil:)
422	1 debiege.	6	1.75	6 4.25

(Black pencil:)
(H. D.)

(Blue pencil:)
One
Hewes 3
C. & B.

(Endorsed.)
(Ink:)
Schutz Bros. & Blath.

July 6, 7–10		4 25
6, "		222 00
7, "		157 50
3, "		552 50
6, "		195 00
3, "		90 00
7, "		202 50
7, "		166 00
		1,589 75
	Dis	111 28
		1,478 47

315 DEF'TS' EXHIBIT C C.

All claims to be made within five days after receipt of goods.
22½.

Fol. 344. NEW YORK, *July 7th*, 1885.

Messrs. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers & manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin Sts.

Terms, 7%–10.

(Blue pencil:)		(Red ink:)		(Blue pencil:)		
487	21 flannel.	210	52.50	10	750	157.50
411	2 cashmeres.	12	3.50	6	425	8.50
		222	56			166

(Bl'k pencil:) (H. D.)

(Blue pencil:) One Hewes. 3 C. & B.

316 DEF'TS' EXHIBIT D D.

All claims to be made within five days after receipt of goods.
22%.

Fol. 343. NEW YORK, *July 7th*, 1885.

Messrs. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers & manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin Sts.

P. O. box 3191.

Terms, 7%–10.

(Red ink:)	(Red ink:)			
210	32.50			
(Blue pencil:)		(Blue pencil:)		
497		10	7.50	157.50
21 flannel.				

(Bl'k pencil:) (H. D.)

(Blue pencil:) One Hewes. C. & B.

317 DEF'TS' EXHIBIT E E.

All claims to be made within five days after receipt of goods.
22%.

Fol. 382. NEW YORK, *July 6th*, 1885.

Messrs. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers & manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin Sts.

P. O. box 3191.

Terms, 7%–10.

		(Red ink:)		(Red ink:)				
		90		25				
(Blue pencil:)				(Blue pencil:)				
411	10 suitings.	42	3	9	9	6.50	65	
652	2 cloth.				21	16.50	33	
		60		15				
650	3 "				20	15	45	
		72		18				
655	3 "				24	18	54	
651	2 "	32		7	16	12.50	25	
								222

(Blue pencil:)
One
Hewes.
C. & B.

318 DEF'TS' EXHIBIT I I.

All claims to be made within five days after receipt of goods.
22%.

Fol. 338. NEW YORK, *July 3rd*, 1885.

Messrs. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers & manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin Sts.

P. O. box 3191.

Terms, 7%–10.

(Blue pencil:)		(Pencil:)	(Pencil:)	(Blue pencil:)		
491	12 flannels.	120	301	10	7.50	90
	(Pencil:) (H. D.)		(Blue pencil:) One Hewes. C. & B.	3		

319 DEF'TS' EXHIBIT H H.

All claims to be made within five days after receipt of goods.
22%.

Fol. 338. NEW YORK, *July 7th*, 1885.

Mess. Jordan, Marsh & Co. bought of Schutz Bros & Blath, importers & manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin Sts.

P. O. box 3191.
Terms, 7%–10.

(Blue pencil:)	(Pencil:)	(Pencil:)	(Blue pencil:)		
497	270	67.50	10	7.50	202.50
	27 flannel.				

(Pencil:)
(H. D.)

(Blue pencil:)
One
Hewes.
C. & B.

320 DEF'TS' EXHIBIT F F.

All claims to be made within five days after receipt of goods.
18–38.

Fol. 383. NEW YORK, *July 6th*, 1885.

Messrs. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers & manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin streets.

P. O. box 3191.
(H. D.)
Terms, 7–10.

		(Red ink:)		(Red ink:)			
		24		6			
(Blue pencil:)					(Blue pencil:)		
655	1 cloth.	90			24		18
		90		18			
657	3 "				30	24	72
		64		14			
		(Blue pencil:)					
651	4 "	One			16	12.50	50
		50	Hewes.	10			
659	2 "		C. & B.		25	20	40
		20		5			
650	1 "				20		15
		248	3	53			195

321 DEF'TS' EXHIBIT G G.

All claims to be made within five days after receipt of goods.
26⅛.

Fol. 343. NEW YORK, *July 3rd*, 1885.

Messrs. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers and manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard and Franklin streets.

P. O. box 3191.

Terms, 7%–10.

			(Pencil:) 228 .	(Pencil:) 66.50			
	(Blue pencil:)				(Blue pencil:)		
411	38	cashmeres.			6	4.25	161.50
			(Pencil:)				
422	92	"	552	161	6	4.25	391.00
			780	227.50			552.50

(Pencil:) (H. D.)

(Blue pencil:) One Hewes. C. & B. 3

322 DEF'TS' EXHIBIT S.

All claims to be made within five days after receipt of goods.

Fol. 301. NEW YORK, *June 28th*, 1885.

Mess. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers and manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin streets.

P. O. box 3191.

Terms, 7–10.

(Blue pencil:)		(Blue pencil:)		
560	15 silks.	14	9.75	146.25
	(Red ink:) 210.00		(Red ink:) 63.75	

(Blue pencil:) One C. & B.

(23)

(Endorsed:)

(Ink:)

Schutz Bros. & Blath.

Jun- 28,	7–10	146 25
" "	"	243 75
" "	"	334 50
" 30,	"	243 75
" 28,	"	114
" 29,	"	146 25
" "	"	156 00
" 30,	"	68 25
" "	"	48 75
		1,501 50
Dis.		105 10
		1,396 40

323 DEF'TS' EXHIBIT T.

All claims to be made within five days after receipt of goods.

Fol. 270. NEW YORK, *June 30th*, 1885.

Mess. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers & manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin streets.

P. O. box 1391.
Terms, 7–10.

(Blue pencil:)			(Blue pencil:)		
560	7	silk	14	9.75	68.25
(Red ink:)			(Red ink:)		
98.00			29.75		

(Blue pencil:)
One
Hewes (24)
C. & B.

324 DEF'TS' EXHIBIT U.

All claims to be made within five days after the receipt of goods.

Fol. 273. NEW YORK, *June 30th*, 1885.

Mess. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers and manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin streets.

P. O. box 3191.
Terms, 7–10.

(Blue pencil:)		(Blue pencil:)		
560	25 silk.	14	9.78	243.75

(Red ink:) (Red ink:)
350.00 106.25.

(Blue pencil:)
One
Hewes. (24)
C. & B.

325 DEF'TS' EXHIBIT V.

All claims to be made within five days after the receipt of goods.

Fol. 264. NEW YORK, *June 30th*, 1885.

Mess. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers & manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin streets.

P. O. box 3191.

Terms, 7–10.

(Blue pencil:)		(Blue pencil:)		
560	5 silks.	14	9.75	48.75

(Red ink:) (Red ink:)
7.00 21.25

(Blue pencil:)
One
Hewes. (24)
C. & B.

326 DEF'TS' EXHIBIT W.

All claims to be made within five days after receipt of goods.

Fol. 292. NEW YORK, *June 29th*, 1885.

Mess. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers and manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin Sts.

P. O. box 3191.

Terms, 7–10.

(Blue pencil:)		(Blue pencil:)		
560	16 silks.	14	9.75	156.00

(Red ink:) (Red ink:)
224.00 68.00

(Blue pencil:)
One
Hewes.
C. & B.

327 DEF'TS' EXHIBIT X.

All claims to be made within five days after receipt of goods.

Fol. 284. NEW YORK, *June 28th*, 1885.

Mess. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers & manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin streets.

P. O. box 3191.

Terms, 7–10.

(Blue pencil:) (Blue pencil:)
560 15 silks. 14 9.75 146.25
(Red ink:) (Red ink:)
210.00 63.75
(Blue pencil:)
One
Hewes. (24.)
C. & B.

328 DEF'TS' EXHIBIT Y.

All claims to be made within five days after receipt of goods.

Fol. 316. NEW YORK, *June 28th*, 1885.

Mess. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, manufacturers and importers of ladies' cloaks and suits, 356 Broadway, bet. Leonard and Franklin streets.

P. O. box 3191.

Terms, 7–10.

(Blue pencil:) (Blue pencil:)
169 2–9 12 jackets. 14 9.50 114.00
(Red ink:) (Red ink:)
168.00 54.00
(Blue pencil:)
One
Hewes. (23)
C. & B.

329 DEF'TS' EXHIBIT Z.

All claims to be made within five days after receipt of goods.

Fol. 313. NEW YORK, *June 28th*, 1885.

Messrs. Jordan, Marsh & Co. bought of Schutz Bros. & Blath, importers & manufacturers of ladies' cloaks & suits, 356 Broadway, bet. Leonard & Franklin streets.

P. O. box 3191.
Terms, 7–10.

		(Red ink:)		(Pencil:)		
		225		9	6.50	162.50
(Blue pencil:)			(Red ink:)			
168 4–7	25 jackets.		62.50			
		(Red ink:)				
168 5–8	12	120	24	10	8	96
		(Red ink:)				
168 2–9	8	112	36	14	9.50	76
		457	122.50			334.50

(Blue pencil:)
One
Hewes. (23)
C. & B.

330 It is hereby stipulated and agreed that the foregoing bill of exceptions, together with the exhibits accompanying the same, be, & the same is hereby, settled upon as being true & correct, & we certify that the same is the bill of exceptions agreed upon in order to review said case upon appeal to the United States Supreme Court.

New York, Ap'l 21st, 1888.

BLUMENSTIEL & HIRSCH,
Pl'ffs' Att'ys.
STERN & MYERS, *Def'ts' Att'ys.*

And forasmuch as the matters and things aforesaid do not appear of record in this cause the foregoing exceptions are hereby allowed and ordered to be filed and placed upon the record thereof as of the term of this court aforesaid.

(Sg.) HOYT H. WHEELER.

331 [Endorsed:] U. S. circuit court. A. Henry Schutz *et al. vs.* Eben D. Jordan *et al.* Bill of exceptions. Blumenstiel & Hirsch, attorneys for plaintiffs, 320 Broadway, N. Y. city. U. S. circuit court. Filed Ap'l 28, 1888. Timothy Griffith, clerk.

332 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Timothy Griffith, clerk of the circuit court of the United States in and for the second circuit and southern district of New York, do hereby certify that I have compared the preceding with the original bill of exceptions in the action entitled A. Henry Schutz, Julius Schutz, and Henry Blath, plaintiffs, *versus* Eben D. Jordan, Eben D. Jordan, Jr., Charles Marsh, and James C. Jordan, defendants, on file and of record in my office, and that the same is a true and correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New York in the district and circuit above named, this 30th day of April, in the year of our Lord one thousand eight hundred and eighty-eight, and of our Independence the one hundred and twelfth.

[Seal of U. S. Circuit Court South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

333 [Endorsed:] Supreme Court U. S. 1887, October term. No. 1280. A. Henry Schultz *et al.* pl'ffs in error, — Eben D. Jordan & *al.* Addition to record. (Bill of exceptions.)

[Stamped:] Office Supreme Court U. S. Filed May 1, 1888. James H. McKenney, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 583. A. Henry Schutz, Julius Schutz, and Henry Blath, plaintiffs in error, *vs.* Eben D. Jordan, James C. Jordan, & Eben D. Jordan, Junior. Filed October 24, 1887.

JAN 24 1891
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

NO. ~~883~~ 280

A. HENRY SCHUTZ, JULIUS SCHUTZ AND HENRY BLACK,

Plaintiffs in Error

vs.

EBEN D. JORDAN, JAMES C. JORDAN AND EBEN D. JORDAN, JR.,

Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR.

A. BLUMENSTIEL,

Counsel for Plaintiffs in Error.

C. G. Burgoyne, 146-150 Centre Street, N. Y.

In the Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 583.

A. HENRY SCHUTZ, JULIUS SCHUTZ and HENRY BLATH,
Plaintiffs in Error,

vs.

EBEN D. JORDAN, JAMES C. JORDAN and EBEN D. JORDAN, JR.

Proceedings in the Case.

The plaintiffs compose the firm of Schutz Bros. & Blath, manufacturers of and dealers in ladies' cloaks, in the City of New York; and the defendants are the members of the firm of Jordan, Marsh & Co., having a large dry goods establishment in Boston, Mass.

The plaintiffs, on the 22d day of September, 1886, brought this action in the New York Supreme Court to recover the sum of $32,604.99 from the defendants for goods sold and delivered between May 7th, 1884, and July 30th, 1885.

See Complaint, page 15.

The defendants interposed a general denial, and in addition pleaded that there was a "fraudulent and cor-

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 583.

A. HENRY SCHUTZ, JULIUS SCHUTZ and HENRY BLATH,
Plaintiffs in Error,

vs.

EBEN D. JORDAN, JAMES C. JORDAN and EBEN D. JORDAN, JR.

Proceedings in the Case.

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The plaintiffs, on the 22d day of September, 1886, brought this action in the New York Supreme Court to recover the sum of $32,604.99 from the defendants for goods sold and delivered between May 7th, 1884, and July 30th, 1885.

See Complaint, page 15.

The defendants interposed a general denial, and in addition pleaded that there was a "fraudulent and cor-

rupt agreement" between one John H. Hewes, their agent, and the plaintiffs, in pursuance of which the latter supplied the merchandise in question. That the goods were, in fact, shipped and *delivered to Hewes*, though in the name of the defendants, so that with the aid of Hewes, the plaintiffs should "come into the possession of moneys of the defendants by way of reimbursement and reward to the plaintiffs for such merchandise thus to be shipped *to said Hewes.*" That the defendants were left in ignorance of the receipt of the said merchandise until long after they were nearly all disposed of, and that the transactions thus referred to constituted the alleged sale and delivery.

See Answer, pages 10, 11, 12 and 13.

The defendants being non-residents of the State of New York, an attachment was issued against their property under the provisions of the New York Code, and after issue was joined, in accordance with the Statutes of the United States as they then existed, the cause was removed into the Circuit Court of the United States for the Southern District of New York, where it was tried before Mr. Justice HOYT H. WHEELER, commencing June 7th, 1887, and ending June 20th, 1887, with a verdict for the plaintiffs for $117.71, for which amount final judgment was duly entered September 13th, 1887 (page 17).

A motion for a new trial upon the minutes was made and considered by the learned Judge aforesaid, and denied August 17th, in accordance with a very elaborate opinion set forth at page 18.

See Order, page 29.

The writ of error was allowed to plaintiffs September 15th, 1887. A complete bill of particulars of plaintiffs' claim is printed on pages 34 to 37.

STATEMENT OF THE CASE.

It was established and conceded that John H. Hewes was a general agent of the defendants, having charge of the cloak and suit department of the defendants; that his authority to buy goods for the defendants was without restriction as to quantity or amount, and that he also controlled the prices at which they were to be sold. In fact, his powers wers unlimited in that department, and he had supreme control thereof.

See folio 89, also page 39, testimony of James M. Robinson. Testimony of John H. Hewes, page 90, folio 178; also page 106, also bottom of page 109 and page 110, folios 212, 213, also page 150.

Mr. Eben D. Jordan, against our objection, which the Court overruled, and to which we excepted, testified at page 123 that prior to January 1st, 1884, he instructed Mr. Hewes to keep the stock down "so that he could handle it and turn it," "to buy often and turn it quick" (see also page 124 and our exception there noted), yet he conceded that Hewes was the manager of the department of defendants' premises (page 122). And the first question is therefore whether defendants were not liable for all purchases made by Hewes in their behalf and which were delivered to them.

SECOND. Whether the alleged instruction to Hewes to keep the stock down can be held to have restricted his powers so as to absolve the defendants from liability for any and *all* goods that he might buy—especially when, as here testified, no limit was prescribed as to the amount he might or might not buy, nor any restriction imposed upon the parties from whom he could purchase.

All the goods sued for were bought by Hewes as agent *for the defendants in their name, at the prices mentioned, were all received by the defendants, sold in their department* in the usual way, *the money received by them and all disposed of at a profit.* In addition it was

established that with every shipment an invoice of the goods thus sent was *mailed directed to the defendants at their business place in Boston.*

We proved the sale by James M. Robinson (fol. 89). The shipment by the persons in plaintiffs' employ having that in charge, to wit, Miss Blaksley (page 51), Alfred C. Hertz (page 52), their delivery by the agents of the express companies, whose depositions were read (fol. 111), the receipt books and tickets of the New York and Boston Dispatch Company (fol. 113) and also by the testimony of A. J. Dunlap and William Lippman (pages 52 and 53), also testimony of Mr. Mott, (page 129 and page 130).

Further, it was testified to and not contradicted that the defendants, through Mr. Hewes, gave directions to have all the goods shipped to them by the New York and Boston Dispatch Company, and all excepting three or four cases were so shipped, the latter being sent by the Adams Express Company on February 4, 1885 (fol. 90), for which a receipt was produced and identified (fol. 113). (See testimony of Hewes, pages 104 and 105, who substantially concedes the receipt of all the merchandise; also bottom of pages 129-130 and page 156).

The making out of the invoices with each shipment, and the mailing thereof *on the same day that the goods were sent* was proven by the testimony of Mr. Mott, the plaintiffs' bookkeeper (pages 68, 69 to 72; folios 141, 142 and 143) and that of George Dawson (page 51).

In addition to the mailing of the invoices or bills it was also shown that *statements* were sent to defendants, one *July 7, 1884*, containing a list of fourteen bills sold and delivered between March 29th to May 13th, another sent November 8th, 1884, comprising all the items of purchases down to September 27th, 1884, and another November 18, bringing the account down to November 3d, still another mailed April 14th, 1885,

including all the sales to April 11, 1885 (page 69, folios 141 and 142).

Irrespective of the presumption of the receipt of the letters arising from the fact of proper mailing, there was affirmative evidence that they had reached their destination, for none were returned, though the envelope had the address of the plaintiffs printed on the outside (folio 143, page 70); besides, Mr. Hewes admits that they were delivered at defendants' place of business, and were opened at the main office (page 94, also folio 221, page 114), *so that the next question is whether defendants were not liable on the purchases by Hewes from the plaintiffs, from the fact of having received these letters containing invoices and statements, and whether the fact of mailing did not presumptively establish the fact of their receipt and of knowledge of the purchases on part of the defendant (see 8th assignment of error).*

It further appeared by the evidence of the defense that the goods sued for had been sold by defendants at a profit (fol. 218), that the proceeds came into the possession of the defendants and were retained by them (fol. 218), and that the unsold goods on hand at the time of the alleged disclosure by Hewes of his alleged faithlessness to the defendants—such of the merchandise sold by plaintiffs which was still on hand—was retained and afterwards disposed of and the proceeds thereof kept by the defendants.

The goods were all capable of easy identification, and not only was there no offer to return such property, but it was all sold by defendants in the same way as they sold the rest of their goods, and they knowingly received and retained the proceeds (bottom of page 102, fol. 199; also pages 103, 104, 105, 112; testimony of Hewes, pages 120 and 121; testimony of Gardhan, who says: "The defendants have asserted ownership from that time to this and treated them as their own goods;" testimony of Jordan, p. 125; testimony of Robinson, page 131, folio 250; testimony of Blath, page 134).

The uncontradicted evidence in the case showed that Hewes having unlimited authority to buy for defendants, ordered all the goods in question for them; that they were shipped to the latter, received at their warehouse, sold by defendants' employees in regular course of business, all the proceeds turned over to and received by them; none of the goods were billed to them at excessive prices; they realized a profit, and after Mr. Hewes claimed to have confessed to defendants that in his anxiety to do a large business for them and thus increase their profits, and the discovery by defendants, therefore, of such large purchases having been made, the defendants knowing that they were in possession of a portion of the goods received from plaintiffs under and in pursuance of the alleged fraudulent arrangement, *went on selling and disposing of them, receiving and retaining the proceeds without any offer to return, and indeed without any attempt to repudiate the sale excepting the refusal to pay, which facts prevented the further question whether the defendants are not liable because of having retained the fruits of the alleged fraud of Hewes, after defendants obtained knowledge of the facts* (see 6th, 7th and 9th assignments of error).

The defendants claimed that they ought not to pay for any of the goods, and alleged that there was no sale because of the arrangement set forth in their answer. The following is an abstract of what was testified to on the part of Mr. Hewes as being the plan and agreement under which the purchase was made from the plaintiffs: he says that he wanted to buy largely of the plaintiffs, but that he was then carrying more stock than the defendants wished, and if Robertson, the salesman, would see "that no statements were sent to the house, dunning bills or letters of any kind," he might be able to buy some of the goods, "and on that basis I did buy *some* of them" (fol. 178, pages 90 and 91). Note the conversation was only with Robertson, the salesman, not with any of the plaintiffs, and observe also that he re-

quested no statements to be sent to the house, yet it is in proof that the plaintiffs nevertheless did send statements of purchases direct to the house by mail (page 69, folios 141 and 142), *which brings up the further question in the case, to wit, whether the fact of mailing the invoices and statements to the defendants is not presumptive evidence of the receipt of such document, and therefore some evidence that defendants had knowledge of the purchase and delivery of this merchandise. The Court below held to the contrary* (see folio 294).

There was another interview at which Hewes claims to have stated to Mr. Robertson as follows: "I said I was carrying a very much larger stock than they (the defendants) wished me to carry, and that they were continually finding fault with me from that very fact. That was the substance of the conversation (end of folio 179). All the orders I ever gave him for Schutz Bros. & Blath, I either gave him in this department or at the hotel where the samples were in Boston."

This is the entire testimony relating to the alleged conspiracy, because of which it is claimed that defendants need not only not pay for the goods, but had the right (under the charge and opinion of the Judge) to keep the merchandise and the proceeds, even after discovery of the facts through which defendants got the property. We say most respectfully that these facts communicated to Mr. Robertson did not discharge or relieve the defendants from liability for the goods purchased. That in fact a verdict should have been directed for plaintiffs as we requested (1st assignment of error).

There is further testimony on the part of Mr. Hewes with reference to the plaintiffs' application for payment, but this all occurred after the purchases, and after the bills were due.

Mr. Hewes says (fol. 180): "A very long time after these goods were bought, and when the bills were overdue, he (Robertson) came to me one day

and told me that his firm had asked him to tell me to pass some bills and have some money sent; that they need money and I promised to send the money. This was *more than six months* after the goods had been bought. *There was nothing said on the* subject how the money should be got for them. It was left to me. I was to pass the bills and get the money the best way I could, and in fact as I could.

Again at fol. 185, he says the time that he passed the first bill was long after the goods were bought.

There is additional evidence by Mr. Schutz and Mr. Blath of frequent solicitation addressed to Mr. Hewes to pass some of the bills and get money for the plaintiffs. There was nothing unusual in this, because according to the custom of defendants' business methods, no bill would or could be paid without first being "*passed*" *by the buyer or head of department.*

There being no dispute, and in fact it being conceded that defendants received all the merchandise sued for, yet it was claimed that upon the above facts defendants were not liable for *any part* of the merchandise obtained by them of the plaintiffs (see testimony, pages 95, 96, 100).

The cross-examination elicited the fact that after the alleged disclosures of the circumstances by which Hewes got into defendants' possession over $250,000 worth of merchandise which they kept, and for which they repudiated any liability;—Mr. Jordan took Mr. Hewes into partnership with him in the hotel business, loaning him $25,000 (pages 100, 101, 107); Jordan's testimony, pages 125, 126, 127); while up to the time of the partnership Mr. Hewes continued in defendants' employ under same salary as before (page 101). The defendants indeed rewarded Hewes for his alleged "misconduct" and devoted their energies in the effort to hold on to all the property he got for them and give no return therefor.

Defendants, after knowledge of the circumstances

surrounding the purchase, retained the property—not only not offering to return any part thereof, but indeed continued to sell the very goods sued for and kept the proceeds (pages 103, 104, 105, 112, 113, 117, 121, 125, [fols. 240] 127, 128), while the goods bought of plaintiffs realized a profit to the defendants (page 113).

That Hewes had no intention to defraud defendants or any one else in making the purchase (see page 106, page 113, fol. 219, also fols. 241, 242, page 126):

"Q. (To Mr. Jordan): Do you believe that his purpose and his sole purpose was to make large profits for the firm and so ingratiate himself with his employees and get a large salary?

A. I think so, yes. I believed he was honest so far that all the money he got he turned to us.

Q. I am not now talking about money, but about making these few purchases in your name and on your account. Do you believe that was honest?

A. Yes, sir.

Q. And you have sustained him ever since?

A. Yes.

Q. And you are now his partner?

A. Yes."

That defendants got into the possession of one quarter of a million dollars worth of goods, which they claim was without their knowledge, and though they got the proceeds they say they *never knew of the purchases.* This, too, when the amount of goods so purchased was most unusual, and notwithstanding the fact that every package passed through the hands of various employees of defendants before reaching the selling department of defendants' warehouse. *But even assuming that defendants' theory was a defense, the question is whether the burden of proof was not upon defendants to establish the fraud,* particularly where it appears defendants left all of the property and proceeds.

We claimed, and still assert, that this defense was the result of a plan devised by Jordan and Hewes to

get property into their possession without ever intending to pay for them. Our theory is strongly evidenced by the fact that Mr. Hewes continued in defendants' employ right along for a year, was then taken in as a partner and placed under the special protection of Mr. Eben D. Jordan, that he was associated with Mr. Jordan in this way up to the day of the trial of the action. That none of the other defendants, excepting the senior member of their firm, did testify, while it appeared that this witness was absent almost the entire period during which plaintiffs' goods were delivered. *That instead of repudiating the action of their agent,* Hewes, the defendants *ratified it by holding on to the property, making not the slightest effort to rescind the transaction.*

Besides all this it further appeared in evidence without contradiction that of the goods sued for $23,338.68 in value was delivered between November 5, 1884, and June 20, 1885. It is undisputed that all this property was received by defendants, also sold by them at a profit, and the proceeds came into their hands. It is also admitted by the evidence that Eben D. Jordan, the only one of the defendants who testified, was absent from this country during the period above mentioned. He alone testified that defendants had no knowledge either of the purchase or receipt of this merchandise. The other defendants who were in charge of the store when the goods came in did not appear to deny want of knowledge. The further question, therefore, is presented *whether defendants were not liable for these goods and whether the denial of knowledge of their purchase by Jordan is sufficient, non constat but that* all the other defendants (who alone could know) had full knowledge of the purchase and delivery of this property as well as of its sale. Neither James C. Jordan nor Eben D. Jordan, Jr., testified whether, in fact, the burden of proof of establishing such *want* of knowledge as was claimed *was not upon* defendant.

See request, page 159; also at page 158; also

the exception at folio 302, page 161; and also at folio 304, page 161; also tenth assignment of error, page 31.

We claimed in the Court below and now submit that the jury should have been directed to bring in a verdict for the plaintiffs for at least the purchase price of these goods sold and delivered between November, 1884, and June, 1885.

While this Court may, perhaps, not disturb the finding of the jury upon any question of fact concerning which there was a conflict, yet in considering the exceptions taken in the case, it is proper and important that the character of the evidence should be viewed and examined in the light of the theory which we contend for. It is well at times to read between the lines, and consider whether the amount of goods received and the action of the defendants in holding on to them and their proceeds, while rewarding their alleged faithless agent, is at all consistent or innocent with the pretense set up by the defendants.

The learned Judge presented the case so erroneously upon the law, that it could not fail to mislead. He assumed in his charge the correctness of defendants' version, and required the plaintiffs to prove the falsity thereof. He deprived us of the presumption of defendants' knowledge of the purchases arising from our having mailed the invoices and statements to the defendants, and held that we were required to show by other evidence than that of mailing them that defendants *actually* received the letters. Indeed, the learned Justice assumed *as a proven fact* that the plaintiffs had been guilty of fraud, and substantially so charged the jury, holding that plaintiffs were required to overcome the evidence of conspiracy testified to by defendants' witnesses.

Specification of Errors.

These are all set forth in the printed record, commencing at foot of page 29.

First.

EFFECT OF MAILING.

That the Court erred in its ruling on the effect of mailing the invoices and statements. It appears in the charge as follows (fol. 294): "In the course of the trial there have been put in evidence the fact testified to by witnesses on the part of the plaintiffs, that some letters—some containing statements—and some other letters, I think, were mailed here in New York. The defendant Mr. Jordan, who has testified, and their clerk, who has charge of the receipt of their correspondence, Mr. Basset, and some others have testified, tending to show that the letters were not received."

"The fact the plaintiffs mailed such letters, whether the defendants received them or not, bears upon the question as *to the conduct of the plaintiffs and their good faith in this transaction. It does not affect the defendants unless they received the letters.* The fact that a letter is mailed does not, in Court, establish the fact that the person it is mailed to received it. That is not proof of the fact. In certain transactions about protesting notes and charging endorsers of commercial paper and things of that sort *the mere* fact of mailing a letter answers, but when a party is to be affected with knowledge of what is in the letter and the contents of it, and what goes with it, *they must go further and prove not only that it was mailed but that the party to whom it was addressed got it.*

Now, as I said, the fact that a letter was mailed by the plaintiff would have a bearing as showing how

they understood the matter and how they acted in regard to it; *but unless the proof shows* that the defendants got the letter and what was with it, does not affect them in their conduct with it.

The exception appears at foot of page 160, as follows:

"I except to the charge that the fact that the plaintiffs mailed the letters claimed to have been mailed, while it bears on the good faith of the plaintiffs, does not affect the defendants unless the letters were received."

"I except to the charge that although mailing of notice of protest of a note, for instance, is sufficient to charge a party who does not receive it, yet where a party is to be affected in the knowledge of the contents of letters, as understood in this case, the plaintiffs must go further and *show that the party to whom it was addressed got it.*"

Also at foot of page 158, as follows:

"MR. CHOATE: I ask your Honor to charge as to the matter of the receipt of letters and other communications proved to have been mailed by the plaintiffs to the defendants, that in the absence of proof from each defendant, that such letters, etc., were not received by any one of them, the mailing is *prima facie* evidence of the fact of receipt.

THE COURT: Unless the other side prefer to have that so stated, rather than to have an exception to it, I will leave that as I stated it, that the fact of mailing does not prove the fact of receipt.

MR. CHOATE: *What I ask is* that the fact of mailing in the absence of any denial by each one of the defendants is *prima facie* evidence that it was received.

THE COURT: I don't quite think that is the law.

MR. CHOATE: Will you now give me an exception?

THE COURT: Yes.

Second.

Burden of Proof.

Second error relates to the charge and requests to charge on the *burden of proof*. It must be taken in connection with the whole charge. It appears specifically at folio 293, as follows:

"I have been requested to instruct you as to the burden of proof.

"As to that I can only say that the burden of proof is on the plaintiffs to make out their case and make it out all the way through; that is, in the first place they must show you that these goods were sold *in the usual course to Mr. Hewes acting for the defendants*, but if they fail in that, it is for them to satisfy you that this quantity of goods was so large that the defendant must have known about it and ratified it by going right along and selling after they had found out about it, that it is on the plaintiffs to make out their case.

"The fact that the goods got into the establishment of the defendants or that the goods were received by the carrier which the *defendants authorized* to take the goods here in New York is made out—there is no question about that; no question in the case but what plaintiffs parted with their goods or that they got where the defendants are liable for them if they bought them; there is no question about that. If they make out that the defendants did buy them, then the defendants had the goods and are liable for them.

"But that the bargain was a bargain for the sale of these good to Mr. Hewes in the usual course of business, it is for the plaintiffs to make out, further and if they do not make that out, that the defendants ought to have known that they were receiving those goods is to be made out by the plaintiff."

The exception is at folio 302, as follows:

"The plaintiffs except to each and every proposition

of the charge as to the burden of proof, and particularly to the charge that the burden is on the plaintiff to make out that the sale was in the usual course, we claiming that the proof of the sale as a sale by the plaintiffs to the defendants' agent is complete and that the burden is on the defendants to show that there was any fraudulent collusion which would defeat the sale."

"The plaintiffs except to the charge that the burden of proof is on the plaintiffs to show that the defendants ought to have known that defendants were receiving the goods."

THE COURT: "It is to the whole charge in the burden of proof."

MR. CHOATE: "The whole charge on the burden of proof."

We tendered to the Court in addition a request on this subject, page 162:

"The burden of establishing the defense set up in the answer is upon the defendants, and such defense being founded upon allegations of fraud and conspiracy, the same must be proven to the satisfaction of the jury. Fraud is never presumed. It must be proven by facts which warrant such an inference."

Third.

RATIFICATION.

The error is assigned in the 6th and 7th paragraphs, page 30, of the Record.

The following request was tendered and refused (5th, page 165):

"That if after discovery of the alleged fraud and complicity the defendants asserted ownership over any part of the property and retained the same, then such act amounts to a ratification sufficient in law to make the defendants liable."

Refused. Exception taken by plaintiffs.

Also on page 163: "Even assuming that the sales were originally made with the fraudulent arrangement alleged by the defendants, yet if they, while such purchases were being made knew that the plaintiffs were selling them goods or were put on the inquiry by the surrounding circumstances, they must be held to have ratified the acts of Hewes, and are liable for the purchase price. The defendants are conclusively charged with knowledge as to whether goods knowingly received by them are being paid for, and if they had reason to believe by any information they had, by the size of the stock in their premises or for any other cause, that the goods on hand or the sales were beyond proportion to the communicated purchases, then the jury may find that they adopted the acts of Hewes in making such purchases."

Refused except as charged. Exception by plaintiffs.

"If either member of the defendants' firm knew that the plaintiffs' goods were being received without their being paid for, the knowledge of such defendant is the knowledge of all."

"The mere fact that Eben D. Jordan testifies that he did not know of such goods being purchased is not conclusive or presumptive evidence that neither of the other defendants had such knowledge, particularly as from November 5, 1884, to June 20, 1885, he was absent from the country. The omission of the other two members of the firm to testify on behalf of the defendants in this respect should be considered most strongly against the defendants. Where a party omits to call an available witness in a material matter, the jury may properly infer that such failure to testify is due to the fact that if called he would testify adversely."

Refused except as charged. Exception by plaintiffs.

Fourth.

ERROR AS TO REFUSAL TO DIRECT A VERDICT FOR THE GOODS sold and delivered between November 5, 1884, and June 20, 1885. The request and refusal is on page 159, as follows:

"That in respect to the goods sold and delivered between the 5th of November, 1884, and the 20th of June, 1885, the period of Mr. Jordan's absence, amounting to $23,338.68, and with interest to $27,033.80, the jury is not at liberty to find upon the mere denial of Mr. Jordan, in the absence of the evidence of the other defendants, that the firm had no knowledge of their purchase and receipt, as they came."

THE COURT: "I will leave that just as I have stated"——

MR. CHOATE: "I except to your Honor's refusal to charge that."

Also, at page 161, error of the same character, to wit:

"We request the Court to charge that the defendant, E. D. Jordan, having left the country the day following the election of Cleveland as President, November 5, 1884, and remaining absent, as testified to by him until June 20, 1885, during which period most of the transactions in question arose, and as he could not have knowledge of these transactions, his denial of knowledge is not sufficient proof that the defendants or some of them did not have knowledge of the transactions in question. The refusal of the Court to charge that I except to. Your Honor told the jury—what you did tell them about it—that it would not be conclusive, but that they would have a right to consider it. Now we claim that in the absence of any denial by the other defendants the absence of proof on the subject is proof of knowledge. We ask the Court to charge there is insufficient denial of knowledge of transactions during that period. To the refusal to charge that the plaintiffs except."

"Then I ask the Court to charge the jury that as to the goods testified by the plaintiffs' witnesses to have been sold and delivered to the defendants during that period the jury must find a verdict for the plaintiffs."

This request the Court refused to charge except as already charged and plaintiffs except.

Fifth.

RECEIPT OF THE GOODS by *Erlacher*, defendants' receiving clerk.

Page 161:

"I ask the Court to charge that the reception of the goods by Erlacher as proved, there being no complaint of Erlacher's good faith to his employers, is presumptive evidence of the knowledge by the defendants of their receipt"——

The Court declines to charge as requested, except so far as the point is covered already by the charge, and plaintiffs except.

Sixth.

REFUSAL TO DIRECT VERDICT FOR PLAINTIFFS.

Page 129 and page 148:

"Counsel for plaintiffs ask the Court to direct a verdict for the plaintiffs for the claim on the ground that no defense had been proved——"

The motion was denied and plaintiffs except.

And at the close of the case a similar motion as follows (p. 148, fol. 279):

"Counsel for plaintiffs renews his motion to direct a verdict for the plaintiffs upon the grounds stated at the close of defendants' case, and on the further ground that it now stands undisputed on the evidence, that there was no such conspiracy, collusion or arrange-

ment between Mr. Hewes and the plaintiffs as is set up in the answer, and counsel also moves to amend the complaint by adding to it a count for money had and received to the same amount as is claimed in the account on goods sold and delivered."

Both motions denied and exception taken.

See also first, third and fourth assignment of error, page 3.

Seventh.

REFUSAL OF THE COURT TO PERMIT AMENDMENT OF COMPLAINT.

At the close of the defendant's case plaintiffs moved " to amend the complaint by adding to it a count for money had and received to the same amount as is claimed in the account for goods sold and delivered " (fol. 279, page 148). This was denied, and exception taken. It appeared uncontradicted that the defendants received at least the purchase price of these goods. Hewes said they were all sold at a profit. Defendant had our money—and it was but justice that they should pay it back. Under the provisions of the New York Code, Section 723, this should have been allowed.

Eighth.

ERROR IN THE ADMISSION AND REJECTION OF EVIDENCE.

(*a*) Question to Mr. Bassett, defendant's bookkeeper (foot of page 77):

Q. " Did you have any account after June, 1884, in the purchase ledger in which any items referring to Schutz Bros. & Blath were entered?"

Objected to by plaintiffs' counsel as immaterial. Objection overruled and exception.

(*b*) Question to Mr. Hewes, defendants' agent (page 96):

Q. "Did you or did you not cause the goods to be marked down during that period of two years, or two years and a half?"

Objected to. Objection overruled. Exception by plaintiff.

A. "I did."

(*c*) Q. "Did you or did you not enter on that book (mark down book) all those accounts of stock (fol. 189)?"

Objected to by plaintiffs. Objection overruled and exception noted by plaintiffs.

A. "I did suppress many of them."

(*d*) Question bottom of page 96:

Q. "You have stated that you had made a second statement to Mr. Robertson in regard to the firm being opposed to your carrying so much stock in that department?"

A. "Yes, sir."

Q. "What had taken place between the firm and yourself on that subject?"

Objected to. Objection overruled. Exception.

(*e*) Question at fol. 190:

Q. "Inquiry has been made as to the persons from whom Jordan, Marsh & Co. made its largest purchases for your department, and the name of Friedlander & Co. was mentioned. Did you handle many goods coming from that firm?"

Objected to as immaterial. Exception taken (foot page 97).

A. "Yes, sir; I have handled a great many goods, both from Friedlander & Caspar and from A. Friedlander & Co."

(*f*) Q. "Did you or did you not keep the defendants from knowing of the reception of these goods?"

Objected to. Plaintiffs except.
THE COURT: He may answer that.

A. "I did."

(*g*) Q. "How was it as to good acquired from Simonson & Weiss?"

Objected on the same grounds as before. Exception.

Bottom of page 98.

(*h*) Q. "Did you or did you not keep the defendants from knowing of the reception of these goods?"

Objected to by plaintiffs. Objection overruled Plaintiffs except.

Question to Mr. Hewes, page 119.

(*i*) Q. "You said that you sold goods for less than you could get for them. Why did you do that?"

Objected to by plaintiffs. Exception taken.

A. "They were marked down to make quick sales, so that I could get these plaintiffs' money as fast as the sales were made. The larger the sales the more money I could get for them."

(*j*) Page 123, question to Mr. Jordan by defendants' counsel as follows:

"Please state what instructions or directions were given by you to Mr. Hewes prior to January 1st, 1884, in

regard to the amount of stock that he should carry in that department?"

Objected to. Objection overruled and exception noted by the plaintiffs.

A. "My instructions to him was to keep his stock down so that he could handle it and turn it, and in that way we could make something; by any other process we could not."

Q. "Did that have any special reference to goods of changing styles and fashions that were dealt in, in that department?"

Objected to. Objection overruled and exception noted.

(*k*) Page 128, folio 245, to Mr. Jordan:

Q. "Is it not a fact, that you are defending this suit and others by the other claimants whose names you mention, because you have believed, and now believe still, that the payment of these asserted claims would not only extinguish any profit that was made in that department managed by Hewes in the last two years of his management, but all entail a loss on your part?

Objected to by counsel for plaintiffs as leading and immaterial.

Objection overruled and exception taken.

A. "Yes, sir."

POINT I.

Mailing of Invoices as Presumptive Evidence of their Receipt.

As the eighth ground of error, page 30, we claim that the Court erred in ruling that the mailing of the letters and invoices by the plaintiffs to the defendants *was not*

prima facie evidence of their receipt by the defendants.

See the charge at folio 294, our request at folio 298—near bottom of page 158, and top of page 159; also exception at foot of page 160.

The importance of this exception cannot be overestimated. One of the chief questions before the jury was whether defendants *knew of the purchase* or of the *receipt of these goods.* If they received the invoices and statements which plaintiffs and their employees testified were mailed to them, then they must have known that Hewes was buying this merchandise for their account, and by remaining silent and receiving the property they necessarily ratified his act. The plaintiffs were therefore entitled to have the law laid down correctly as to the presumption arising from the mailing of these documents. The plaintiffs were entitled to have the *legal effect of that proof properly explained to the jury.* The presumption of receipt arising from the fact of mailing, plaintiffs were certainly entitled to; yet the Court not only ruled that such a presumption did not exist, but went further and said that we must prove that defendants *actually received* the letters. That proof of proper mailing was not sufficient and raised no presumption of fact in our favor.

The authorities are all one way in upholding the position we contended for, but which the learned Judge denied, to wit: "That the mailing of a notice properly directed to the party to be charged raises a presumption of *notice in fact*, for it is presumed that letters sent by post to a party properly directed were received by him in due course."

Best on Presumptions, Sec. 403.
" " Evidence, Sec. 400.
Howard vs. Daly, 61 N. Y., 362, 365.
Austin vs. Holland, 69 N. Y., 571.
Huntley vs. Whittell, 105 Mass., 391.
Rosenthal vs. Walker, 111 U. S., 185.
Bell vs. The Lycoming Fire Insurance Co., 19 Hun (N. Y.), 238.

In the case in this Court (Rosenthal vs. Walker, 111 U. S., page 185), Mr. Justice WOODS, says: "The rule "is well settled that if a letter properly directed is "proved to have been either put into the post-office, or "delivered to the postman, it is presumed, from the "known course of business in the post-office depart- "ment, *that it reached its destination at the regular "time, and was received by the person to whom it was "addressed.*"

The learned Judge then cites a large number of authorities, among others, Huntley vs. Whittell, 105 Mass., 392, and then proceeds:

"As was said by GRAY, J., in the case last cited: "The presumption so arising is not a conclusive pre- "sumption of law, but a mere inference of fact, founded "on the probability that the officers of the Government "will do their duty, and the usual course of business, "and when it is opposed by evidence that the letters "were never received, *must be weighed* with all the "other circumstances of the case by the jury in de- "termining the question whether the letters were ac- "tually received or not."

See also to the same effect

Hastings vs. Brooklyn Life Ins. Co., 6 N. Y. St. Reporter, 374,

where J. MACOMBER says "that there is a presumption "of law that a letter or other paper duly directed and "mailed, was received in regular course of the mail, "and that the *burden of proof* that it was not actually "received is *thrown upon the person claiming the con- "trary*," and in that case the judgment was reversed for this error. Also Oregon Steamship Co. vs. Otis, 100 N. Y., pages 446, 451, where the Court not only upheld this proposition as well-settled law, but applied a *like presumption to the delivery of a message properly addressed to a telegraph company, Judge* FINCH of the Court of Appeals says: "The presumption indulged in "is one of fact, and so open to rebuttal and contradic-

" tion, and consists merely in the natural inference " which may be drawn from the experienced certainty " of transmission" (see language at pages 452 and 453).

Also Olney vs. Blosier, 12 N. Y. State Reporter, page 211.
Also Lindenberger vs. Beall, 6 Wheat., 104.

The proof on our part of the proper mailing of these invoices and statements was clear and controlling, depending not merely on the testimony of one witness, but of several (see page 69, folio 142, and in particular folio 143, page 70; also folio 145, page 71; also testimony of George Dawson, page 51).

The bookkeeper testified not only that he sent four statements of the account as it stood between plaintiffs and defendants at different times (folios 141 and 142), but also that with every shipment and *on the same day* the goods were dispatched he also sent an invoice of such shipment (bottom of page 69 and folio 143). Against this we had only the testimony of Joseph M. Barrett, the defendants' bookkeeper (pages 75 and 76) to the effect that he never received any of the four statements, *but he said nothing as to the non-receipt of the invoices.* He testified that this was left to the corresponding clerk, who had charge of the division of the mail" (folios 155 and 156; see also folio 169). *This clerk was not produced as a witness.*

Mr. Hewes testified that he got the bills referred to out of the box marked No. 1 (which was his box) (folio 184) and that he kept them (folio 186; see also folios 221 and 222).

Mr. Jordan, however, when called, did not testify at all on the subject of whether he ever received any or all of these invoices or statements. It appeared in fact that he was away almost all of the time covered by these transactions (folio 234 and folio 299). He was abroad from November 5th, 1884, to after June 20th,

1885, during which period over $23,000 of the goods sued for were received, and none of the other members of the firm were called to testify. So that the non-receipt by the firm or some of its members, of the invoices and statements, was left open, more to inference than to any positive denial by any of the defendants.

The want of knowledge by the firm of these invoices and statements was inferred merely from the testimony of two of the clerks as to the course of business. Assuming, however, that such evidence was some proof to sustain defendants' contention, we certainly, under the authorities cited, *were entitled to have it weighed* as against the *presumption of fact* arising from the mailing of these documents to the defendants, and it then would have been for the jury to say whether the testimony of the defendants overburdened the presumption which our evidence established.

This right the Court deprived us of, but stated to them in substance that the fact of the mailing proved nothing, even *prima facie*, so that the only evidence which, under the charge of the Court, the jury could consider was the denials of their receipt by defendants' witnesses, which denials the jury were told in substance were conclusive upon us.

On the motion for a new trial, based in part upon this error, the learned Judge, while conceding the error made by him in this respect (bottom of page 21 and in particular fols. 52 to 57 inclusive, pages 23 to 25), held that the error *was immaterial*, because the defendants' employees testified that *the defendants themselves* never got them, thus assuming as a basis of his ruling the absolute truth of the *testimony of defendants' witnesses*, including that of Mr. Hewes, a self-confessed rogue. He says (fol. 56): "The invoices were by the arrangement found to go to the superintendent (Mr. Hewes), and by the undisputed evidence they did go to him." * * * "There was no dispute about the fact of this course of business." * * *

"The ruling contended for by the plaintiffs would have left the jury to find that the defendants themselves received the letters, not only beyond but contrary to the presumption arising from the course of business shown in this case, while the ruling made, so far as applicable, merely confined them to it. However erroneous the supposition of the Court as to the law on the subject of this ruling may have been, no *misdirection of the jury which would mislead them in this* case is made to appear."

Even if we had to assume that the testimony of the defendants' witnesses in the absence of an express contradiction was conclusive proof of its truth, still we were deprived of the weight which should have been given to our evidence.

The presumption of fact created by the equally uncontradicted evidence of the due mailing of the invoices and statements was not only not presented, but was denied us by the Court, so that upon the charge the jury were told there was nothing to prove that the fendants ever received the letters.

Certainly this was misleading, and the error acted very materially to plaintiffs' prejudice. But the denial of Hewes was not necessarily conclusive even though not expressly contradicted by any of our witnesses. If the jury had been correctly charged in respect to the presumption of fact arising in our favor from the proof of the mailing, then the evidence of defendants as to non-receipt would have been a contradiction thereof, and the jury might have concluded that our testimony and the presumption created thereby overcame the denials on the part of defendants.

It is well settled law that the testimony of interested parties may be disbelieved by the Court or jury, even though no positive contradiction is presented. Both Mr. Hewes and Mr. Basset, being employees of the defendants, had an interest which would not render their

testimony necessarily conclusive, even though uncontradicted.

Honegger vs. Wettstein, 94 N. Y., 252, 261.
Elwood vs. Western Union Tel. Co., 45 N. Y., 549.
Same Case, 6 Am. Rep., 140.
Sipple vs. The State, 99 N. Y., 284, 290.
Becher vs. Koch, 104 N. Y., p. 394.

We call the attention of the Court in particular to the case of Elwood vs. The Western Union Tel. Co., 45 N. Y., pages 553 and 554, as showing how the New York Court of Appeals deals with the subject.

The weight of authority seems to be that the testimony of parties or persons interested in the subject of the action or having some relation to the matter in suit is not conclusive either upon Courts or juries, even though such evidence is not expressly contradicted.

The learned Judge, however, in overruling our motion for the error here referred to, treated the testimony of the defense as conclusive upon the subject of the receipt of the letters, and therefore held that the mistake of law in the charge did not mislead the jury or prejudice us.

This and every other appellate Court has held that proof of the due mailing of a letter properly directed is *prima facie* evidence of the fact that it reached the person to whom it was addressed.

This Court has also defined *prima facie* evidence of a fact to be such evidence as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for that purpose.

Kelly vs. Morris, 6 Peters, 622.

When a court, therefore, deprives us by its ruling of such evidence it must be error, even though the fact is rebutted.

It is the same in this case as though the Court had

rejected proof of the mailing of the letters upon the ground that their receipt had been denied.

For the jury were told that the proof of the mailing established nothing as against the defendants.

If the jury had been properly instructed they might have found that the defendants had personal knowledge of these invoices, which fact would have gone very far towards establishing plaintiffs' right to recover.

II.

Burden of Proof.

The fifth and thirteenth assignment of error relates to the ruling of the Court upon the burden of proof, and to which exception was duly taken.

The action being to recover the price of merchandise sold and delivered, and the proof being that the goods set forth in the complaint had been contracted for by the general agents of the defendants at the prices mentioned; that they had been delivered to and received and retained by the defendants, we established, as we believe, a complete case against them. The defendants by their proof having conceded that Hewes had unlimited powers to purchase, and it not being disputed that the prices demanded were right, nor denied that the goods had been delivered and duly received, but the defendants having disclaimed liability only by reason of alleged private instructions given to Hewes, specially restraining him, which instructions, it was claimed, had been communicated to Robertson, the salesman of plaintiffs, and also it being further alleged and sought to be established by the evidence submitted on behalf of the defense, that the plaintiffs conspired with Hewes

to sell and deliver more goods than the defendant desired Hewes to purchase; in other words, that there was fraudulent collusion between Hewes and the plaintiffs' salesman, we claimed at the trial, and now likewise submit to this Honorable Court, that the burden of proof to establish the special restriction upon Hewes' powers and the alleged fraudulent collusion rested with the defendants.

The Court charged at folio 293 that the burden of proof "is on the plaintiffs to make out their case and make it out all the way through;" "that is, in the first place they must show you that these goods were sold in the usual course to Mr. Hewes, acting for the defendants, but if they fail in that, it is for them to satisfy you that this quantity of goods was so large that the defendants must have known about it, and ratified it by going right along and selling after they had found out about it; that is, it is on the plaintiffs to make out their case. The *fact that the goods got into the establishment of the defendants, or that the goods were received by the carrier which the defendants authorized to take the goods here in New York, is made out; there is no question about that; no question in the case but what the plaintiffs parted with their goods, or that they got where the defendants are liable* for them if they bought them; there is no question about that. If they make out that the defendants did buy them, then the defendants got the goods and are liable for them.

"But that the bargain was a bargain for the sale of these goods to Mr. Hewes in the usual course of business it is for the plaintiffs to make out further, and if they do not make that out, that the defendants *ought to have known that they were receiving* these goods is to be made out by the plaintiffs."

We excepted to this branch of the charge (see fol. 302, page 160) as follows: "The plaintiffs except to each and every proposition of the charge as to the burden of proof and particularly to the charge that the

burden is on the plaintiff to make out that the sale was in the usual course, we claiming that the proof of the sale as a sale by the plaintiff to the defendants' agent, is complete and that the burden of proof is on the defendants to show that there was any fraudulent collusion which would defeat the sale. The plaintiffs except to the charge that the burden of proof is on the plaintiffs to show that the defendant ought to have known that defendants were receiving the goods."

THE COURT: "It is to the whole charge on the burden of proof?"

MR. CHOATE: "The whole charge on the burden of proof."

As an abstract proposition there is no doubt of the general rule *that plaintiff must make out his case*, but after the evidence given on the trial, as before stated it was misleading to have failed to tell the jury that the burden of proof was on the defendants to establish the special instructions given to Hewes whereby his general powers were sought to be restricted. We also submit that it was for defendant to establish the alleged fraudulent collusion. As the case was presented, however, the theory of defendants was assumed to be correct, and the Court substantially charged that the plaintiffs were to negative the alleged fraud and to establish that there was no collusion, as well as negative the allegation that they knew of the restriction.

The Court substantially told the jury that because collusion was pleaded and a witness testified thereto the burden of proof was upon the plaintiffs to overcome the evidence by preponderance of proof, that is to say, though it was established by all the testimony in the case that Hewes was the general agent with power to purchase for the defendants, that he did buy and that the goods were received and disposed of by the defendants; yet, because it appeared in the case

that Mr. Hewes testified that he had a conversation with Mr. Robinson with reference to keeping down the stock, and thereupon an arrangement was made to keep back bills, &c.; that such testimony of itself is to be *taken as absolutely true by the jury as against the plaintiffs*, and that the burden of proof is upon the latter to overcome it, or that they must get rid of it by a preponderance of evidence.

Now, it seems to us that a mere statement of such a proposition shows its fallacy.

If the Court was right, then in every case where a defense of fraud is alleged and allegations in respect to that defense are made by a witness on the stand, produced by the defendant, the jury must assume it to be true and plaintiff must prove his innocence by a preponderance of proof.

That in every case where fraud is alleged or sworn to by persons who, as shown in this case, are interested witnesses, it is to be not only negatived by the plaintiff, but negatived in such a manner as to constitute a preponderance of evidence in favor of the plaintiff.

That is to to say, if the rulings of the Court in this case is correct, the burden of proof being upon the plaintiffs throughout, the burden of proof would be upon the plaintiffs throughout to overcome any affirmative defense set up by the defendants.

We respectfully submit such is not the law. That in a case like this, all the elements of a sale being shown and not disputed, and a fraudulent conspiracy or arrangement being alleged as a matter of defense, to show that what would otherwise have been a sale is no sale, we claim that under every principle of law and of justice, the burden of proof was upon the *defendants* to establish the facts alleged to overcome the evidence of the sale.

Technically, it is true that the burden of proof to make out a case throughout is upon the plaintiff. There is no case in law where the cause of action being denied,

the burden of proof is not upon the plaintiffs, because before he can recover he must establish that he is entitled to recover; *but still it is misleading and erroneous to say* that where an affirmative defense is alleged or matters are charged which must be affirmatively proven in order to overcome the plaintiffs' case, that the burden of proof is upon the plaintiffs to overcome such allegations.

If this proposition of the Court is sound, then it would be the duty of the plaintiffs to negative every charge of fraud set up in the answer, for under the defendants' theory such allegations negatived the sale, so that after proving the sale and delivery as the plaintiffs did in this case before they rested, it would have been their duty to call witnesses to show that what was alleged in the case with respect to fraudulent collusion was not true; they also would have to show that the defendants had actual knowledge of the reception of these goods notwithstanding the proof of actual delivery.

We maintain that such a proceeding on the trial and by a plaintiff would appear absurd. Had we attempted to negative these allegations of fraud in advance before they were testified to by the defendants, the Court would certainly have said that we were not bound so to do; that the defendants should first establish them; therefore, we submit that the burden of proof was *upon the defendants* to establish the fraud by a preponderance of proof and for the Court to say to a jury who are not lawyers, but laymen, that the burden of proof is upon the plaintiffs *throughout the case* under such evidence as was elicited in this case, substantiatlly is telling the jury that the burden is upon the plaintiffs to prove their innocence of the alleged fraud.

The defense in this case, if any, was clearly one of fraud—also that Mr. Hewes' powers (though a general agent) were restricted; that such limitation was com-

municated to the plaintiffs' salesman, the restriction being that he should not carry too much stock.

Hewes being the general agent, this restriction, though imposed upon the defendants' agent, would not bind the plaintiffs unless communicated.

The burden of proof of the fact, however, that this restriction on his general powers had been communicated would certainly be upon the defendant to establish. It was error, therefore, to charge the jury in substance that the burden of proof of not having known of such restriction was upon the plaintiffs; *because the fact of such communication is an affirmative defense to be shown and established by the defendants, and want of knowledge of such restriction was not upon the plaintiffs to prove.* So likewise the fraud and collusion set up by the defendants had to be established *by them* by a preponderance of proof.

The ruling of the Judge would have been correct if Hewes had not been an agent with general and unlimited authority, or if it had been denied that he was the general agent; then, of course, it would have had to be established by the plaintiffs; or, if it had been shown that he was simply a special agent authorized by him to perform certain special duties, the plaintiffs would in such a case have had to show that these particular sales were within the range of such limited power; or if Hewes had not been an agent at all of the defendants, and he had assumed the right to contract on behalf of the defendants, and that he did contract in the manner set forth in the complaint, and if then the plaintiffs claimed that the defendants had *ratified his acts*, the burden of proof would have been upon the plaintiffs to establish such ratification, because without the ratification there would have been no contract on the part of defendants. In other words, the contract needed something else to make it binding, and that something would have had to be proven by the plaintiffs.

A few illustrations may here be aptly cited:

Take the case of a promissory note purporting to be signed by the defendants. If the defendants denied the signature, the burden of proof would be upon the plaintiffs to establish that it was their signature or else that it was subscribed by some one having power to sign for them; but on the other hand, if the defendants admitted the signature or conceded that it was signed by some one who had general power to sign their name to all negotiable paper, and averred that the signature was procured by fraudulent representations or that the signature was obtained through any other fraud, the burden of such proof, we claim, would be upon the defendants and not upon the plaintiffs. The plaintiffs in such a case would have the right to invoke the presumption of law and fact which favors innocence rather than guilt. And yet even in such a case it might be said that the burden of proof is upon the plaintiffs. throughout.

It would be misleading, however, for a court not to say to the jury that it was on the defendants to establish the fraud or other fact, by which it was sought to overcome the *prima facie* case established by the plaintiffs.

"Where a plaintiff makes out a *prima facie* case "the burden *is upon the defendant to disapprove it, and* "this notwithstanding that the burden is always on the "plaintiff. It is a shifting of the *onus probandi* that "occurs in every trial where one party makes out a "*prima facie* case."

Ascher vs. Park Bank, 7 Albany Law Journal, 43.

In that case the plaintiff made a deposit of money in the bank and the teller entered the deposit as $5,050. After the plaintiffs had left with the bank book the money was recounted and found to be $1,000 short, notice of which was given to the plaintiff. The latter

disputed the statement of the bank and brought suit to recover the $1,000.

The Judge charged the jury that the entry in the book was *prima facie* evidence that the defendant had received the money and that the burden of proof *was on the defendant* to show that he did not receive it.

Exception was taken to this and on appeal from the judgment for the plaintiff it was held that the Judge was not in error in charging that the burden of proof was on the defendant; he simply charged that the entry was *prima facie* evidence that the defendant received the amount, and that the burden of proof was on the defendant to show that they did not receive it. This charge was of the same character, as that in Caldwell vs. N. J. S. S. Co., 47 N. Y., 290, which case is very strong in our favor. It was an action for negligence resulting in injury to the plaintiff while traveling on defendant's boat.

The Court said at page 290: "The affirmative of the "whole issue was upon the plaintiff and it was incum- "bent upon him to establish negligence to the satisfac- "tion of the jury. The burden of maintaining the "affirmative of the issue and, properly speaking, the "burden of proof, remained upon the plaintiff through- "out the trial, but the burden or the necessity *was cast* "*upon the defendants to relieve themselves from the pre-* "*sumption of negligence raised by the plaintiffs evidence.*"

At page 291 the Court continues: "The burden of "proof, relieving themselves of the charge of negli- "gence rested properly and justly upon the defendants."

This statement properly conveyed to the jury that the presumption arising from the plaintiffs' proof unless overthrown by evidence produced by the defendant, *must prevail.*

Here the plaintiffs made out sale and delivery fully, and we submit the burden of proof *was on the defendant to overcome it.* It was *upon them* to establish the truth

of their charges of fraud against the plaintiffs, and *not upon the plaintiffs to show what they, defendants, claimed was not true.*

To say to the jury without qualification, as was done here, that the burden of proof is upon the plaintiffs *throughout the case*, tended to mislead them. It was the same as though the Court had said: "The defendants having *given evidence* of a conspiracy or collusive sale, you are bound as against the plaintiffs to believe it unless the latter by a preponderance of proof overcomes the evidence of the defendants."

It was in substance instructing the jury that the story told by Hewes and Jordan, both of whom it was shown were strongly interested in the case (one being a party to the action and the other a partner of the party), that they must be believed unless the plaintiffs overcame their testimony by a preponderance of evidence. This is contrary to law and likewise in conflict with another well settled rule, that even when there is no contradiction the jury may properly refuse to believe the testimony of an *interested witness*, as well as the evidence of a party to the action, though such witness be not impeached.

Stillwell vs. Carpenter, 59 N. Y., 414.
Stafford vs. Levy, 34 Sup. Ct. Rep., 269.
Brooklyn Cross Town R. R. vs. Strong, 75 N. Y., 1.
Nicholson vs. Connor, 8 Daly, 212 (New York Common Pleas).

We therefore maintain that it was the duty of the Court to charge the jury as to the shifting of the burden of proof, to inform them that the burden had shifted as in this case upon the defendant.

In the case of People *ex rel.* Judson vs. Thatcher, 7 Lansing, 286 (New York), it is said in examining contested questions of fact, the *onus probandi* is thrown

from one party to the other several times, according as the proof may change.

See also opinion in that case on appeal in the Court of Appeals, 55 N. Y., 535.

In the case of Dalrymple vs. Hillenbach, 62 N. Y., 5, and Cowing vs. Altman, 71 N. Y., 435–440, it is stated that the burden of showing fraud is upon the party who seeks to impeach his title.

In other words, it is held that though in every case the burden is on the plaintiffs to maintain the issues, yet certain things shown by the plaintiffs shift the burden on to the defendants, and such burden does not shift back again unless that which the defendants maintain is conceded to be true, or the jury believes it to be true.

We respectfully submit that in the case at bar, the burden of proof, after the plaintiff produced evidence on their side of the case, always remained with the defendants, the allegations of fraud and collusion being denied by the plaintiffs, the burden of establishing such alleged fraud *remained with the defendants all the way through.*

Another illustration: A plaintiff holds a bond and brings action upon it. The possession of the bond is *prima facie* evidence that he is the lawful owner, and that the defendant owes him the amount therein set forth. Now, if the defendant wishes to repel such presumption, the burden is upon him. He may show the title to be in a third person, or that there was fraud in the execution, or that the amount therein mentioned was altered or raised, or that it was forged, still the *onus probandi* of establishing any of these matters would be on the defendants (and yet even here, technically speaking, the plaintiff would have to make out his case all the way through).

Would it be sound, however, to say to the jury in such a case that the burden rests on the plaintiff to make out his case *all the way through*, and thereby in-

structs the jury to believe that the fraud, forgery, etc., stands proven merely because the defendant so swears? Would it be proper to say that the plaintiff must overcome such evidence by a preponderance of proof?

The Court will notice that it was substantially said to the jury "the defendant *has proven* that there was fraud, intent, collusion, which it is for the plaintiff to overcome."

See following authorities upon the proposition claimed by us:

Hellman vs. Lazarus, 12 Abbott's N. C., pages 19–24. New York Court of Appeals.
Nicholls vs. Mase, 94 N. Y., 160–164.
Leyboldh vs. N. Y., L. E. & W. E. R. R., 95 N. Y., 562–569.
Blackner vs. Castie, 21 Weekly Dig., 445.
Murphy vs. Coney Island & Brooklyn R. R. Co., 36 Hun, 199.
Howell vs. Wright, 41 Hun, 167.
Frank vs. Otis, 2 N. Y. State Rep., 679.

And similar citations will be found in the Federal Reports.

Gay vs. Parpart, 106 U. S., 679.
Nelson vs. Woodruff, 1 Blk., 156.
McKinney vs. Neil, 1 McLean, 540.

Fraud *is not to be presumed but should be proven by the party alleging it.*

Cooper vs. Galbraith, 3 Wash. Rep., 546.
Jordan vs. Dobson, 2 Abb., 398.
McLean vs. Lafayette Bank, 3 McLean, 587.
The Bridgeport, 7 Blatchf., 361.

Upon the motion for a new trial, the learned Judge considered this question (fol. 45 and bottom of page 21); see the reasoning at fol. 49, where the Court not only assumes that the denials in the answer are to be assumed "as true until disproved," but says, "neither did the proof of the facts which the defendant's evidence tended to show in connection with the proof

merely that the goods were sent and received and disposed of without more, make out a cause of action. They (the plaintiffs) undertook to show an order from a duly authorized agent accepted by them. The defendants did not deny the authority, but did deny the giving of the order. The latter was as essential to the plaintiff's case as the former." We contend that the defendants did not deny the giving of the order by Hewes, their general agent, nor the receipt of the property. They alleged fraud and collusion as the reason they were not bound. But for the fraud claimed they would be liable. Of that there is no question. Why then was not the burden of establishing it upon the defendants? And in what sense was it correct to say that the plaintiffs had the burden of proof throughout?

The defendants' counsel in their argument, and the learned Judge in his opinion on the motion for a new trial, assumed the truth of the defendants' defense as pleaded and testified to, and from that assumption argued that the burden of proof was upon the plaintiff to establish the contrary of defendants' version. They say that the jury "*have found there was no sale*"—"no bargain to be ratified," and that the goods "were smuggled into defendants' premises by plaintiffs actively in collusion with Mr. Hewes." While such may be the translation of the jury's verdict as rendered we answer that *this result was reached* under the erroneous instructions given them by the Court. We submit most respectfully that it is arguing in a circle to maintain that because of the jury's verdict there was no error in the charge, or that, if there were any, it worked no injury; *non constat*, if they had been properly instructed, the verdict would have been otherwise.

We maintain that every element of a sale and delivery to defendant was proven by us, and that we were entitled to recover, unless the charges of fraudulent con-

spiracy were made out, which allegation had to be established by defendants by a preponderance of proof.

The goods were ordered by Hewes, the general agent of defendants, who had power to buy where and as much as he pleased (fol. 206, page 106; fol. 212, page 109; and page 110; also fol. 219, page 113, also folios 241 and 242, page 126). The merchandise was all received by the defendants and disposed of by them, a large part before this action was brought—the rest afterwards (fol. 199, pages 102, 103, 104, 105; fol. 216, page 112; fol. 218, page 113; fol. 232, page 121; fol. 239, page 125).

The defendants therefore were liable unless they established the fraud alleged. *The onus of proving this defense was upon them and not upon the plaintiffs.*

III.

Ratification arising from the retention of the goods and the receipt of the proceeds after knowledge of the alleged fraud.

This is set forth as the sixth and seventh grounds of error (page 30). It was shown by the evidence of the defense that after defendants learnt of the purchases from the plaintiffs, they nevertheless retained the goods then on hand; that they sold and disposed of them, keeping the entire proceeds. According to Mr. Hewes, the first conversation he had with the defendants with respect to the "deceitful manner" in which he had conducted the department was July 3d, 1885 (fol. 193, page 99) and the confession in regard to the dealings with plaintiffs was made about August 24th, 1885 (fol. 194). After that the goods that came from plaintiffs

as well as those that came from other merchants under similar purchases, were set apart (see pages 103 and 104, particularly fol. 216, page 112; also Mr. Gardham's testimony, foot of page 121 and 122, that of Mr. Jordan at page 125).

"Q. Did you make any offer after these disclosures were made to you to return to plaintiffs the goods found in your possession?

A. I think not.

Q. Have you ever since August, 1885, made any offer to return the proceeds of any of these goods that had been sold?

A. No, we could not tell whose they were.

Q. Assuming the fact to be as proven by Mr. Hewes that they all sold for more than cost, now, have you made any offer to pay them anything on account (see page 113, test. of Hewes on this subject)?

A. No. I think that on the 25th of August, 1885, almost *all the goods that Mr. Hewes had obtained from the plaintiffs had been disposed of and the proceeds of all that were sold had come into our possession.*

Q. Was it by your authority that after the goods had been recognized as having come from the plaintiffs and set apart *that* they were turned back into stock?

A. I think it was—I don't recollect the circumstance.

Q. Do you know whether they have been sold or not?

A. I do not.

Q. If they have been sold the profits have come into your hands?

A. Of course" (see also end of fol. 255, page 134).

All this evidence presented the question of ratification of the alleged unauthorized acts of defendants' agent, Mr. Hewes.

We accordingly presented certain requests to charge covering this point, which was refused and to which refusal exceptions were duly noted.

See 5th request page 163 also 5th request, page

165, and also request at foot of page 162 and exception to refusal to charge that request page 163.

We confidently submit that under the law as laid down by the leading cases, there was here a clear case of ratification, even assuming that Hewes had no authority to make the purchases in the first instance. As regards plaintiffs' goods, it was conceded that they realized more than cost (page 113) and not only was *there no offer to return any part of the proceeds, but even the goods on hand at the time of the disclosure,* were purposely kept, and sold by defendants and the proceeds retained.

Not even an effort was made to restore a single dollar of property; on the contrary all the goods alleged to have been fraudulenty obtained were kept—those of the plaintiffs as well as those that came from others concerning whom defendants made similar charges as here.

We beg to refer the Court to the following authorities as adjudications in our favor on the question of ratification.

Peoples' Bank vs. National Bank, 101 U. S., 181–183.
Gaines vs. Miller, 111 U. S., 395.
Dubily vs. Gregg, 8 Wall, 242, 267.
Wharton on Agency, Sec. 89.
Watson vs. Gray, 4 Keyes, 385 (New York).
Murry vs. Binninger, 33 How. (N. Y.), 435.
Meehan vs. Forrester, 52 N. Y., 277.
Cobb vs. Dows, 10 N. Y., 335.
Buddenbecher vs. Lowell, 32 Barb., 2.

IV.

As to the goods sold and delivered during Mr. Jordans' absence.

This is the tenth ground of error (page 31).

Of the goods sued for, there was delivered to the defendants between November 5th, 1884, and June 20th, 1885, the sum of $23,338.68. See bill of items (page 36 and 37) (the year is there erroneously printed, should be 1885). Mr. Jordan, the only one of the defendants who was called upon to testify, and who denied knowledge as to the fact of the receipt of the goods, was absent from November 5th, 1884, to July, 1885 (fol. 122 and page 159; also page 158; also our request and exception, page 161, fols. 303 and 304; also fol. 47, page 21, also fols. 51 and 52, page 23, also folio 168, p. 84).

Mr. Jordan of course could not swear that *the firm* did not know of the receipt by them of the merchandise that came in during his absence. None of the other partners testified, all that *he* could say was that *he himself* had no knowledge of these purchases. He having been absent his want of information was immaterial. The learned Judge at Circuit however stated that the burden was upon the plaintiffs "to prove by circumstances or otherwise, *knowledge*, and not on the defendants to prove *want of knowledge* (page 23, opinion of Judge Wheeler).

This we claim was error, for it assumed on a basis that there was fraud on plaintiffs' part. We submit that having established the purchase by a general agent and receipt of the goods at defendants' place of business by their agent, and the sale thereof by them, and payment of the proceeds to defendants, it was incumbent *on the defendants* to establish by competent evidence that all this occurred without their knowledge and against their consent. It was not for plaintiffs to prove defendants' knowledge.

This we submit could not be proven by the testimony of one who was not in the country at the time, nor by omitting to call as witnesses those of the defendants who alone could testify as to the facts.

We strongly believe that such witnesses were not called purely because they would not have substantiated the claim of the defense, nor take part in the neat conspiracy by which it is sought to cheat the plaintiffs out of their property and give it to the defendants.

V.

There was no defense proven.

Conceding all that was testified to by Hewes and Jordan to be true, we claim that there was no defense established.

We so contended at the trial, and asked the Court to direct a verdict in plaintiffs' favor.

Fol. 247, page 129, and fol. 279, page 148. See also first and third grounds of error, page 30.

The answer (pages 10 to 12), besides alleging the general issue, also set up that the goods were to be shipped and delivered *to Hewes*, were to be received *by him*, be intermingled with defendants' property, and the plaintiffs were, by trick and device, to come into wrongful possession of defendants' money "by way of reimbursement for said merchandise." That the plan was carried out, and that it was a part of the understanding and conspiracy between Hewes and the plaintiffs that the business prestige, capital, etc., of defendants was to be used to dispose of plaintiffs' goods.

The delivery of the goods to the defendants is also denied, and an allegation made that the merchandise referred to *was really delivered to Hewes.*

It is hardly necessary to say that these allegations in the answer were not even *attempted* to be established. The proof of the plaintiffs as to the general authority of Hewes, the purchase by him, the delivery of all the merchandise to defendants at their place of business, and the sale of the entire property and receipt of the proceeds by defendants, was not in the least controverted by any testimony whatever.

There was not even an intimation or suggestion that the prices charged for the goods were unreasonable, or that there was any defect or complaint of any kind attachable to the property itself.

There was *no evidence that Hewes was restricted, expressly or implied, by the firm from making purchases of the plaintiffs for as large an amount as he chose,* or that *he was prohibited from dealing with plaintiffs,* or *that any limit in figures was fixed* upon his purchases.

The Court will in vain search for any such evidence. On the contrary, the proof was all the other way. See testimony of Mr. Hewes, fols. 178 and 179.

The entire gist of Hewes' evidence was that defendant told him he was carrying a much larger stock than they desired. That they were continually finding fault with him in that respect (see top page 97). Hewes on cross-examination asserts that the general complaint of the defendants was *that he was carrying too much stock.* This complaint had been *going on for five years or more.* Still he made no change, but increased the amount of the purchases to the knowledge of defendant, and continually increased the stock in his department from year to year.

(Page 106) "His (Jordan's) instructions were to keep my stock down all the time. HE DID NOT TELL ME NOT TO BUY ANY PARTICULAR KIND OF GOODS. HE DIDN'T ADVISE ME NOT TO BUY OF THE PLAINTIFFS. HE DID NOT PUT ANY RESTRICTIONS UPON ME AS TO THE AMOUNT OF GOODS I WAS TO BUY FROM THE PLAINTIFFS, NOR AS TO THE PRICE, TERMS OR KIND OF GOODS."

Everything he bought of the plaintiffs was bought in the name of Jordan, Marsh & Co. and for their benefit. (See fols. 206 and 207, also fol. 212).

By Plaintiffs' Counsel: Q. "I would like to have you tell the jury what was the limit that Mr. Jordan put upon you as to the purchases for your department?"

A. *There was never any limit.*

Q. You had unlimited authority to buy?

A. Perhaps not so broad as that. I was instructed all the time to keep my stock down.

Q. You had authority to buy without any limit as to quantity, or from whom you could buy?

A. *I never had any limit as regards figures*——

Q. *There was never a time when from any limit you* were not *free to buy from anybody, any lot of goods at any price?*

A. *I never had any limit placed upon me.*"

See page 113, where witness testified that all the plaintiffs' goods were sold above cost excepting one item on which there was a loss of $2.50. (Also fol. 221).

He testified also that his object in buying "*was to benefit and advance the interest of the defendants,*" and that he increased the business from $250,000 to $500,000 a year. There was a net profit to the business in that department of $101,694.37. (Fol. 220).

Mr. Jordan testifies that his instruction to Hewes was to keep *his stock* down so *that he could handle it or turn it.* (Fol. 237).

He, Mr. Jordan, believed that Mr. Hewes *was honest throughout in all these transactions,* so much so that he took him in as a partner, giving him $25,000. (Fol. 242).

The only irregularity, if any, was the fact that plain-

tiffs were willing to and did wait a long time for their money. Perhaps they should have demanded payment as part on the bills matured. They did not. They were lenient.

And for so doing the Court and jury have decided that defendants are entitled to keep all this property and its proceeds without paying plaintiffs a single dollar.

Giving defendants' version, the utmost liberality of construction in their favor, where is the line to be drawn in the purchases from the plaintiffs? When did the overstocking occur?

It must be conceded that Hewes was authorized to purchase some goods.

He had charge of a department in defendants' store, which he had to supply with merchandise.

At what figure was he to stop, and when did the liability of defendants commence and when did it cease?

According to defendants' theory, defendants were liable for *none of the purchases wherever or whenever made*, that the omission to enter the amount on defendants' books, absolved them from the duty of paying for such goods. That whenever Hewes held on to the invoices and failed to report the purchases, though the goods were sold by and for the defendants, no liability would arise for the purchase price, because of the failure of Hewes to report the purchases.

The mere statement to a vender by a general agent of a purchaser, that his principals did not want him to carry too much stock, etc., would, under the rulings in this case, preclude such vendor from recovering for *any merchandise* bought by such agent.

We submit respectfully that no legal defense was established under the evidence in this case.

VI.

Exceptions to Rulings.

We propose to consider first the exception arising from admission of evidence on behalf of defendants, to which we objected.

The defendants against our objection, were allowed to show the purchases made of others—the marking down of the goods, the alleged loss, the omission of the accounts from their books—all of which certainly had nothing to do with the question of whether there was a sale; while the answer tended to and did prejudice our case before the jury.

The errors complained of in this respect will be apparent on mere inspection (bottom of page 77), (*a*), question to Mr. Basset, the bookkeeper of defendants, whether he kept any account in the ledger of the items referring to plaintiffs; (*b*) (page 96, fol. 189, Mr. Hewes' testimony):

Q. "Did you or did you not cause the goods to be marked down during that period of two years or two years and a half? (*c*) (Fol. 189). Did you or did you not enter on that book all those amounts of stock?" Objected to, objection overruled. Exception noted by plaintiff.

A. "I did suppress many of them." (See also question foot of fol. 96.)

(*d*) Question as to purchases from Friedlander & Co. (page 97, fol. 190 and 191), and similar question on page 98 and 99, referring to dealings with other parties not having any relation to the cause of action in suit.

This was admitted, because it was claimed that we had gone into that subject on the cross-examination of Mr. Basset. That branch will be found at page 85, and it will be noticed on mere inspection that these names were only referred to as being persons who appeared on the books of Jordan, Marsh & Co., as sel-

lers; but nothing was said about whether the purchases from these parties were irregularly or improperly made.

It could not be legally used as a foundation for showing in this case that Hewes bought of them surreptitiously. It certainly injured us, and was at most wholly immaterial.

(*e*) (Page 119, fol. 230, to Mr. Hewes).

Q. *You said that you sold goods for less than you could get for them. Why did you do that?*

Objected to by plaintiffs. Allowed. Exception.

(*f*) (Testimony of Mr. Jordan, question on page 123, fol. 236 and also on page 124), calling for the instructions given by him to Mr. Hewes.

Whatever Mr. Hewes said to Mr. Robertson was given in evidence by Mr. Hewes. The conversation between Mr. Jordan and this superintendent was certainly irrelevant, it not being claimed that defendants were present; see the grounds of our objection, fol. 236.

(*g*) Testimony of Mr. Jordan, fol. 245, page 128. This is clearly irrelevant.

VII.

Exception to charge of the Judge.

These exceptions are on pages 159 to 162, and we submit are all well taken.

Several of them are involved in the discussion of the other points in the case and therefore require no separate argument.

The portions of the charge thus excepted to were devoted to a statement or proposition not involved in the issue or evidence in this case. It was not a question of plaintiff having carried or smuggled goods into defendants' premises and their seeking to recover therefor as goods sold. There was no such pretense here, for it was not contradicted that Hewes had the authority to buy of the plaintiffs as he did; neither was it pretended that there was any exorbitant or improper price or charge or that there was any loss occasioned thereby.

On the contrary, the recovery of the price was successfully prevented because Hewes was told he should keep the stock down, which fact he reported to plaintiffs because (adopting defendants' testimony) plaintiffs agreed not to inform defendants of the purchases Hewes was making in their behalf.

It does not appear that at any time was it the duty of plaintiffs to notify defendants personally other than they did by the sending of statements and invoices in the same way as they mailed them here.

The only irregularity seems to have been performed by Hewes, who failed to report the purchases he made and thus omitted to have them appear on the books except as he passed the bills in to be paid.

It seemed marvellous that defendants, who inspected the stock daily, should not have noticed that there was $250,000 more of stock in the cloak department than the books called for. If the incident appeared in a work of fiction it would be said that the author presumed too much upon the credibility of his readers.

That it was not considered strange by defendants and that they felt that Hewes deserved to be rewarded for having so successfully filled their shelves with property, and their coffers with money, for which no return was required, is evidenced by the fact that Mr. Jordan at once set him up in business and invested $25,000 as a

partner (see bottom of pages 125, 126, 127; also pages 100, 101, 102.)

VIII.

We respectfully submit that the judgment should be reversed, and judgment awarded in favor of plaintiffs or a new trial ordered.

A. BLUMENSTIEL,
Attorney for Plaintiffs.

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 280.

A. HENRY SCHUTZ, JULIUS SCHUTZ AND HENRY BLATH,
Plaintiffs in Error,

vs.

EBEN D. JORDAN, JAMES C. JORDAN AND EBEN D. JORDAN, JR.,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

NATHANIEL MYERS,
Counsel for Defendants in Error.

Evening Post Job Printing House, N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 280.

A. HENRY SCHUTZ *et al.*,
Plaintiffs in Error,

vs.

EBEN D. JORDAN *et al.*,
Defendants in Error.

Statement, Points and Argument on behalf of Defendants in Error.

STATEMENT.

This is an action by attachment on an alleged contract for goods sold and delivered at agreed prices amounting to $32,604.99. The answer contained a general denial, coupled with an exposition of a transaction whereby plaintiffs, without defendants' knowledge, had succeeded in smuggling certain merchandise into defendants' premises, and causing it to be intermixed and sold with defendants' goods, as the result of a certain fraudulent scheme between plaintiffs and an employee of the defendants; and which transaction, the answer alleged, constituted the pretended contract sued on. Evidence was introduced *pro* and *con;* the issue was submitted to a jury under a charge singularly lucid and fair to the plaintiffs, and a verdict rendered for defendants on

all items sued on except one, as to which latter there was by the Court's direction a verdict for plaintiffs for $117.77. Judgment was rendered accordingly, to reverse which plaintiffs sued out this writ of error. The particular facts, so far as pertinent to this discussion, will be set forth under the appropriate subdivisions of the argument.

POINTS.

I.

There was no error in the charge of the Court to the effect that such a transaction as was detailed in the answer did not constitute a contract of purchase.

Saville *vs.* Welch, 58 Vermont, 683.
Bolton *vs.* Jones, 2 H. & N., p. 566.
Boston Ice Co. *vs.* Potter, 123 Mass., p. 28.
Strong *vs.* Catlin's, Admr., 35 Ala., 607.
Earle *vs.* Coburn, 130 Mass., 596.
Randolph Iron Co. *vs.* Elliott, 34 N. J., 184.
Hills *vs.* Snell, 104 Mass., 177.
Ladd *vs.* Rogers, 93 Mass., 211.
Tascott *vs.* Grace, 12 Brad. (Illinois), 641.
Bartholomew *vs.* Jackson, 20 Johnson, 28.
King *vs.* Batterson, 13 R. I., 117.
Deysher *vs.* Triebel, 64 Penn. St., 383.
Gowing *vs.* Knowles, 118 Mass., 232.
Gray *vs.* Griffith, 10 Watts (Pa.), 431.
Norris *vs.* Lynch, 121 Mass., 586.
Willett *vs.* Willett, 3 Watts, 277.
Schmaling *vs.* Thomlinson, 6 Taunton, 147.

II.

The fact that the goods sued for were smuggled into defendants' premises and intermixed and sold with their goods, and the proceeds turned into the defendants, does not make out a case of purchase by the defendants.

See foregoing authorities.

III.

The evidence introduced by the defendants not only negatived the idea of a contract between the parties; it was conclusive enough to have justified a direction of a verdict in defendants' favor.

IV.

The burden of proof to make out a contract of purchase was upon the plaintiffs throughout.

V.

The jury having found that the transaction between the plaintiffs and the employee of the defendants was a mere fraudulent contrivance to smuggle goods into the defendants' premises upon the under-

standing that by some subsequent trick and device the employee should procure for the plaintiffs what was considered as reimbursement, there was no contract of purchase ever entered into or contemplated, nor was anything contemplated except a transaction which was *malum in se*, and accordingly there was no contract for the defendants to ratify, and there is no room for the application of the doctrine of ratification.

VI.

There is no error in the Court's charge in any respect.

VII.

There is no merit in any of the exceptions saved by the plaintiffs.

ARGUMENT.

I.

The testimony not only required the Court to submit to the jury the question whether or not the defendants had made a contract of purchase of the goods in controversy; it was so cogent and conclusive that it would have justified a direction to the jury to find that the arrangement between plaintiffs and the servant of the defendants was a fraudulent scheme to smuggle goods into the defendants' stock without defendants' knowledge, and on the understanding, between plaintiffs and the servant of defendants, that the defendants should not even be permitted to know anything about the transaction.

To appreciate the full force of the evidence bearing on this question, a knowledge of the situation of the parties and of their relations towards each other is somewhat important.

The plaintiffs were manufacturers of cloaks and similar garments in the City of New York. The defendants were wholesale and retail merchants in the City of Boston, under the name of Jordan, Marsh & Co. Aside from the wholesale business of the defendants, their retail business in Boston was one of the largest in the country, running into many millions of dollars per annum, and involving dealings in a vast variety of commodities (fol. 44). The premises, occupied for their retail business, were extremely spacious. There were about 2,000 persons in defendants' employ (fol. 234). The business was divided into fifty-two separate and distinct departments, each presided over by a "buyer," whose

business it was to purchase the merchandise required for his particular department, and, generally, to superintend and manage the workings of his department. These departments were numbered consecutively from 1 to 52. The one in which ladies' cloaks and similar articles were dealt in was called Department No. 1, and was superintended by one John H. Hewes. The salesman of the plaintiffs was one James M. Robertson.

In the year 1882 the plaintiffs, through their salesman Robertson, had sold to the defendants, through their agent Hewes, goods to the amount of only $510.50 (fol. 68). In the year 1883 their dealings amounted to $3,516 (fol. 68). Early in the year 1884, the plaintiffs, through their salesman, Robertson, told Hewes they desired to largely increase their dealings. Hewes replied in substance (fol. 223) that he was carrying in his department already as many goods as his employers, Jordan, Marsh & Co., were willing he should carry ; and that if Robertson wanted to sell him more goods it could only be done *upon the understanding that the defendants themselves should not be permitted to know anything about it*, and that it must be left to him, Hewes, to get reimbursement for the plaintiffs in such manner and at such times as he could procure it for them (fol. 179). It appears that although each department had a "buyer," nevertheless the defendants had a system of conducting their business and of informing themselves in regard to it, which they considered to be sufficient to enable themselves personally to exercise a directing control over each and every of their 52 retail departments.

The manner in which the defendants thus sought to keep themselves informed, and by which they guided themselves in controlling the business of the different departments referred to, was this: Whenever goods were bought for a department by the superintendent, who was commonly known simply

as the "buyer," it was his business (fol. 89) to make an entry in a pocket memorandum book of all particulars of the purchase, showing character and quantity of goods, prices and terms of credit. Upon the shipment of the goods by the seller to Jordan, Marsh & Co., the seller would send an itemized "invoice" of the goods by mail, addressed Jordan, Marsh & Co., Boston. This bill is known in the trade simply as an "invoice." The defendants had in their employ a correspondence clerk, whose business it was (fol. 155) to receive, open, assort and distribute all the mail as it arrived each day. They were in the habit of receiving about 500 letters daily (fol. 155). The correspondence clerk would open these letters, so far as they were addressed to the defendants' firm, and would assort them. He would send orders for goods to one place; invoices intended for the wholesale business to another place; remittances to another place; receipts to another place, and he would send all invoices having reference to any of the 52 retail departments to a room in the basement which was called the receiving room (fol. 184), it being a room in the basement in which goods, arriving by freight or express, would be first received. The receiving clerk in charge of that room would receive every day the invoices which had reference to any of the 52 retail departments, and which were sent to him by the correspondence clerk as above stated, and would then assort these invoices, and put them in the proper box marked with a number to correspond to the number of the retail department to which the invoice related:—there being 52 such boxes as a temporary place of deposit for such invoices (fol. 156). It was then the duty of the "buyer" of each department to get from the box pertaining to his department the invoices intended for him, and to compare such invoices with the memorandum made by him at the time of the original purchase of the goods; and, after finding the

invoice correct with regard to quantities, prices and terms of credit, he was then to enter on the invoice opposite each article therein mentioned the selling price at which he determined the article should be sold in his department (fol. 184); and having done that, it was then his duty to O. K. the invoice and pass it to the receiving clerk whose duty it was, upon the arrival of the goods themselves, to ascertain whether they corresponded in quantity and character to those named in the invoice; and if so, it was then his duty to O. K. the invoice also (fol. 184). In that condition, the invoice thus endorsed by the "buyer" and the receiving clerk, would be sent, in the ordinary course, to another clerk who kept a book called the "Entire Book," in which accounts were kept with each of the 52 different retail departments, and in which the goods mentioned in such invoice would be charged against the department, to which the goods had gone, at the selling price marked by the "buyer" upon the invoice as above stated (fol. 156). From that clerk, who kept the Entire Book, the invoice would be passed on to another clerk who kept a book called the Purchase Ledger, in which the amount of the invoice, at the original purchase price, would be credited to the seller of the goods (fol. 157). It would then be the duty of the latter clerk to note the maturity of the invoice in a book kept for that purpose, and to prepare a check for remittance, and to see to the payment of the bill (fol. 157). Upon the "buyer's" receiving the goods from the receiving room, and taking them up into his department, it would be his duty to have a tag or ticket put upon the goods, bearing a selling price corresponding with the selling price which he had put upon the invoice (fol. 156), and at which selling price the goods, as above stated, were charged against his department in the Entire Book. The "buyer" had authority also, in the event that he found goods to be slow of sale or for any good rea-

son, to change the selling price, and to put a new selling price upon the tag or ticket, making an entry thereof, however, in a book kept under his supervision called the Mark-down Book (fol. 184). The amount of these mark-downs would be reported by him from time to time to the person who had charge of the Entire Book, in which they would be credited to the appropriate department (fol. 184). The amount of sales made in each department were also properly entered and credited to the department at the selling price marked on the goods, and at which the goods were sold (fol. 184).

Taking thus the amount of goods charged against any particular department in the Entire Book, and deducting therefrom the sales and the mark-downs credited to that department, it was always an easy matter to determine what amount of goods, at the ticket prices, there should be on hand at any particular time in any particular department; and, except for innocent mistake or theft, the taking of an actual itemized inventory would verify the accuracy of the figures thus obtained.

As a guard against mistake, and to detect whether or not there was theft, an inventory of stock was taken twice a year in each department under the superintendence of the "buyer" (fol. 175).

In order to enable the defendants personally to know the progress and condition of their business in each and every department, and to control its management, there was laid before the members of the firm once a week by the "buyer" of the department a tabulated statement showing the amount of goods on hand in his department at the selling price at the beginning of the month *as ascertained from the books of the firm*, the amount of goods purchased each week subsequent to the first of the month, the amount sold during each week, and the balance that should be on hand at the marked-down ticket selling price; and the tabulated statement contained similar

data for the corresponding dates of the preceding year (fol. 174). In that way the defendants themselves could, at a glance, determine whether or not the amount of sales was disproportionate to the amount of stock carried in the particular department, and whether it was wise to purchase more goods for the department or to curtail the purchases.

The business was one which needed constant supervision for the reason that the goods dealt in were, to a great extent, not staple goods, but such as changed more or less rapidly in style, and such as were affected by change in the seasons of the year; and, accordingly, in order to manage so vast and complicated a business successfully, it was important that the defendants should have *correct* reports, and that they should have them at frequent intervals, and in such form as to enable them to reach a determination at a glance.

The course of business in the department for which Hewes was "buyer" was such that the defendants were constantly complaining to him that he was carrying too large a stock in his department, and that he should "keep down" his stock, and to that end make as few purchases as possible. For reasons of his own, however, he resolved to defeat the defendant's wishes, and to carry in his department as many goods as he pleased, and not to permit the defendants to know the truth with regard to his management.

It should be said that the terms upon which goods were generally sold to the defendants were that the bills against them should not mature until six months after the purchase, at which time they were payable without any discount; but that, if paid within ten days from the date of purchase, they were entitled to deduct seven per cent. gross from the face of the bill (fol. 120); so that if they paid on the tenth day, they got that deduction of seven per cent; whereas, if they waited five months

and twenty days longer, they would be entitled to no discount. In other words, by paying within ten days, they could earn a little over fourteen per cent. per annum on their money. If they did not pay within ten days, but paid within thirty days, they were entitled to a different rate of discount, and likewise a different rate of discount if they paid within sixty or ninety days or four months. The defendants, being perfectly solvent, and having ample means for their business, were in the habit of paying within ten days, thus earning the highest rate of discount fol. 157).

It should also be said that it is a custom among merchants, at the end of every month, if they have claims against other merchants, to send what is called in the trade, a "statement," which is intended for purposes of comparison, and also as a gentle dun, in the event that anything is due. By the system which prevailed in defendants' business, such "statement," when received by the correspondence clerk, would not go to the "buyer" of the department, but to one of the head bookkeepers (fol. 153). This was the situation when, early in the year 1884, Robertson and Hewes entered into the scheme above referred to.

As to what was the fraudulent understanding between them, Hewes testifies (fol. 223) that he told Robertson that he could not buy as many goods as he would like to, "unless some method of concealment could be brought up to cover all this business we were trying to do. The substance of what I told Robertson was that I could not buy as many of him as I would like to unless we could keep it from the house, as they were finding fault with the amount of stock I was carrying; and if he would agree with me that nothing should go to the house—no letters, statements, or anything of the kind—but that they should be sent *to me direct,* I could buy his goods;

that was the substance. That conversation took place in my department February or March, as near as I can fix it. It was before the purchases of the spring business began. * * * The substance of it was that I could not buy as many of him as I would like to, unless he could *keep it from the house;* that they were finding fault with the amount of stock I was carrying, and that *I was overstocked;* and that if he would agree with me that no letters should go to the house, and *nothing to show this thing* —no statement or letters or communications at all— that they should be sent to me direct, and not to the house; that is the substance. Afterwards he said he had seen his firm about it and that it was all right, and there would be *nothing said about it;* that we could go on and do this business, and any statement or letter sent, or anything that was done could be sent to me." At various places in his testimony he repeats the same thing in substance, although in various forms of language. This was the understanding entered into early in the year 1884. The first item in plaintiffs' bill of items is dated May 7, 1884 (fol. 83). At the time that fraudulent understanding was entered into, Hewes told Robertson that the latter's firm might send "invoices" by mail in the ordinary way, addressed to Jordan, Marsh & Co., because, as he explained to Robertson, those "invoices" would come to him, Hewes, direct anyhow, and that the defendants would not see them (fol. 180); but he constantly impressed upon Robertson that other documents, such as "statements" and requests for money, should not be sent to the firm, as they would not reach the hands of him, Hewes, but, on the contrary, would lead to exposure. Upon this understanding, the plaintiffs began the shipment of goods to the defendants' store, the shipments commencing, as just stated, on the 7th of May, 1884, and continuing down to the 30th of July,

1885 (see bill of items filed by plaintiffs, set forth at pages 34, 35, 36 and 37), and aggregating $32,604.99, pursuant to the understanding between Hewes and Robertson. "Invoices" for these different items were sent by plaintiffs, addressed Jordan, Marsh & Co., Boston, and were received by the correspondence clerk, and in the manner above set forth, reached the possession of Hewes, by whom, according to the arrangement with Robertson, they were ever after kept concealed; and accordingly there was *no charge made* in the "Entire Book" against Department No. 1 *for any of* those goods, nor *was any credit* given in the "Purchase Ledger" to the plaintiffs for any of them (fol. 162). The defendants and their bookkeepers had no knowledge of any of these transactions, and not a dollar was remitted by the defendants, nor received by the plaintiffs, in the whole period of time from May 7, 1884, to July 30, 1885, for any portion of the many shipments referred to in plaintiffs' bill of items. Neither did the plaintiffs make any demand whatever of the defendants for anything on account of any shipments during that whole period of time! To put himself in a position in which he could obtain money for the plaintiffs, and yet not expose the scheme in which he was engaged, Hewes obtained from the plaintiffs duplicates of the invoices which they had originally sent by mail; the duplicates, however, containing no dates whatever (fol. 132). The purpose for which he thus obtained those blank-dated invoices was to enable him to certify to their correctness, after he had inserted false dates, which he proposed to do at such times as the condition of his department would enable him to swell the debit on the Entire Book against his department. In that manner it was left to him, Hewes, to fill in dates and to "pass the bills," whenever he might be enabled to do so without exposing himself to detection. Robertson was directed by

Hewes to procure such blank-dated bills for him, and did procure them by having the plaintiffs' bookkeeper send them direct to Hewes (fol. 132). Both Robertson and the plaintiffs' bookkeeper, Mott, admit that that was the only time in their business experience in which they had ever known of blank-dated bills being issued (fol. 132). It goes without saying that such blank-dated bills could have been intended for no lawful purpose.

Upon two occasions, between May, 1884, and July, 1885, to wit: on July 1st and July 9, 1885, Hewes, by the use of some of these blank-dated invoices, procured the defendants to remit to the plaintiffs certain sums of money, having no reference, however, to any of the goods referred to in plaintiffs' bill of items. To accomplish that, he filled in false dates in the blanks, then "O. K.'d" the "invoices" and sent them in, as though in the ordinary form, and thereupon, after they had reached the bookkeeper, whose duty it was to make payment, checks were sent to the plaintiffs accompanied by remittance sheets, which latter expressly explained the purpose of the remittance. Thus, on July 1, 1885, the defendants remitted to the plaintiffs $1,396.40, accompanied by a remittance sheet which set forth that the check "was in *settlement of bills as per memoranda below*," the "memoranda below" reciting nine bills dated June 28th, 29th and 30th respectively, so that defendants supposed they were paying bills from one to three days old. Accordingly, on the face of their remittance sheet, after setting forth the amounts of each bill, and the aggregate, to wit, $1,501.50, they deducted the discount of 7 per cent., to which they supposed themselves to be entitled, to wit, $105.10, leaving the net remittance of $1,396.40 (see fol. 114).

As a matter of fact, although the plaintiffs had bills of such amounts upon their ledger, they had none of those dates. It would have exposed the scheme between them and Hewes, however, had

they called the defendants' attention to the fact that there were no such bills upon their books, and that the defendants were not entitled to any such discount! There was, therefore, no other course left to them, in order to keep the scheme concealed, except to acknowledge receipt, as by the remittance sheet they were expressly requested to do, and accordingly they sent the defendants a receipt acknowledging $1,396.40 "in settlement of bills *as per statement rendered us*, which has been placed to your credit" (fol. 117); and thereupon the plaintiffs' bookkeeper, Mott, put a check mark on his ledger account with the defendants opposite each of the old items thus extinguished (fol. 123), and none of them appear on the bill of items sued on in this action.

The same thing occurred with reference to the remittance of July 9, 1885, whereby defendants sent plaintiffs a net remittance of $1,478.47, as though in supposed payment of eight supposed bills, falsely dated July 3, 6 and 7, 1885, respectively; so that, being the promptest possible paymasters, they supposed they were paying bills 2, 3 and 6 days old; and accordingly they deducted a discount of $111.28, and expressly set forth the calculation on the face of their remittance sheet which accompanied their check, and in which sheet they set forth that they sent the check "in settlement of bills *as per memoranda below;* please acknowledge receipt and oblige," &c. (fol. 116).

The plaintiffs had no such bills on their ledger account with the defendants; but did have bills of like amount running back to June and May *of the preceding year*, and some of them to the preceding September, (fols. 120, 121 and 129). Accordingly, they were again compelled to elect whether to confess the smuggling that had been going on, or to continue the concealment by receipting, as requested; and they elected the latter course, and accordingly,

on July 10th (fol. 132), they acknowledged receipt of the check, $1,478.47, "in settlement of bills *as per your statement*, which has been placed to your credit." And thereupon plaintiffs' bookkeeper again checked off on his ledger account the corresponding old amounts (fol. 128), and plaintiffs suffered the defendants to retain the deducted discount of $111.28, and none of those items are set forth in the plaintiffs' bill of items sued on, nor are the amounts received credited on the bill of items sued on. The amounts received on those two occasions were simply treated by the plaintiffs as in final extinguishment of the particular items checked off in their ledger account; and no remark was ever made concerning the deducted discount. But, as already stated, upon the items mentioned in the bill of items nothing was ever received by the plaintiffs; and, indeed, until after they had been discovered, they made no demand upon the defendants. Frequently, however, they made clandestine demands upon Hewes; although, of course, they had to admit that Hewes, the "buyer," had no more to do with the making of remittances than had Robertson, their own salesman. All that Hewes had to do was to examine and "O. K." the "invoices," when first received—a process which was called in the trade "passing the bills." He had no connection with the office management of the defendants, nor did he in any way handle or control their funds. After having entered on the scheme of concealment, the only way in which he could obtain money for the defendants was by passing false invoices. Obviously, had he passed any of the original invoices, after they had become stale with age, he would at once have exposed the fact of his long continued concealment. So that plaintiffs' secret appeals for money were carefully withheld from the defendants and were made to Hewes alone.

Thus, in June, 1885, when the bills were a year

old, they importuned Hewes for money almost daily, both by letter and telegraph. In fact, as far back as March, 1885, the plaintiff Blath wrote Hewes (fol. 147), and urged him to obtain money for them, and added, "we are in need of money much, and therefore request you not to forget us;" and a similar letter was written by plaintiff Blath on April 7, 1885, to Hewes personally (fol. 147), in which he complained of not having heard from him in answer to his previous letter, and asking to know when they might expect some money. In the following month, to wit, May 29, 1885, the plaintiff, Julius Schutz, took the matter up and wrote Hewes (fol. 147), saying that they had received no money as promised, and adding, "Heavy payments to meet and must have remittances; *telegraph answer.*"

And the plaintiff, Julius Schutz, repeated his importunity on the tenth of June, 1885, referring to a broken promise of Hewes to send them money, and again urged him to get them some (fol. 148). After that the correspondence becomes more active, and takes the form of telegraphic duns. On June 13th, the plaintiff, Julius Schutz, telegraphed Hewes personally for a remittance, and asks for a telegraphic answer (fol. 148), and does the same on June 15th, saying he had no reply to his telegram of the 13th, and asking Hewes to "telegraph instantly" (fol. 148). On June 16th, plaintiffs wired Hewes, saying they had received no reply to their two telegrams and letters, and then they add "we *must have* remittance, *having very heavy payments* to meet this week. Telegraph answer without fail" (fol. 148). This last telegram was signed by the bookkeeper, Mott, by the direction, he says, of Mr. Schutz (fol. 148). The same thing occurs on June 19, 1885 (fol. 149). Each and every one of these telegrams was sent clandestinely to Hewes personally, and not a single communication sent or addressed to the defendants. All this time the defendants were kept

in absolute ignorance that the plaintiffs claimed to have any demand against them whatever.

Sometime early in July, 1885, the fact that Hewes was managing his department fraudulently became a matter of comment among those interested in New York City (fol. 257), and it was finally confessed to the defendants by Hewes, on July 3, 1885, as to some of the parties implicated, though not as to these plaintiffs; and it then became public property as to some of the implicated parties (fol. 257). The plaintiffs themselves confessed that the matter was talked about to their knowledge in New York in the month of July (fol. 257), and it was *with that knowledge* that they continued to keep the defendants in ignorance! Nor was it until the plaintiffs were *accidently placed in a dilemma*, in the month of August, 1885, that they finally confessed to the defendants that they asserted a claim against them.

As just stated, Hewes had had similar fraudulent understandings with a number of other parties. While he had hoped that by carrying a large stock of goods in his department he would do a large and profitable business, the result proved otherwise; and, being overstocked with goods, he was compelled to make extraordinary sacrifices (fols. 232 and 245); and, having started on a career of deception and trickery, he had to resort to other devices of deception and concealment in order to endeavor to effectuate his fraud. Becoming more and more insolvent in respect to his department, and becoming therefore less and less able to obtain remittances to the parties implicated with him, the latter had finally to elect whether to abandon their claims, or to put on a bold front and assert their demands. One of them took the latter course; and in that way the matter came before Mr. Marsh, one of the defendants, who forthwith summoned Hewes and obtained from him a partial confession (fols. 193 and 209).

To what extent Hewes had concealed his doings, and how he had contrived to succeed for so long a time will be set forth later on. Suffice it to say at present that, having discovered that certain parties had been fraudulently co-operating with Hewes to keep the defendants in ignorance of the condition of their own business, the defendants, as an additional protection to themselves, and as an additional means of preventing the further success of any such scheme, *altered the form of the remittance sheet* which they had theretofore used, by adding to each remittance sheet a notice printed in red ink to the effect that they, the defendants, understood that the check accompanying the remittance sheet was *in full of all demands up to the first of the then current month*, and asking the person to whom the check was sent to *receipt accordingly*, OR, if incorrect, to *notify* (fols. 109 and 238). Meanwhile, as Hewes was the only one who had placed orders for goods for his department, and as he was therefore the only one who would be able to judge of the correctness of invoices that might thereafter come for goods ordered in previous months, and as he was the only one from whom the defendants could hope to obtain any information as to the different parties implicated with him in his fraud, and as to the extent and details of the matter, they kept him about their establishment, although he was no longer permitted to make any purchases, nor to exercise any control. He was acting in that capacity (fol. 207) when, in the interest of the plaintiffs, he fraudulently procured the remittance of July 9th. As stated, he had, on the 3d of July, confessed to the defendants as to some of the parties, but had not done so as to these plaintiffs (fols. 193 and 209).

It so happened that on August 7, 1885, the defendants sent plaintiffs a remittance of $1,084.21, as in payment of a bill of July 22, 1885, deducting the usual 7 per cent. That remittance was enclosed in

a remittance sheet (fol. 109), which in red ink, contained these words: "This is intended as a settlement in full for all our purchases of you up to the current month, and you will oblige us by rendering your receipt to that effect, or notify us to the contrary at once." As stated, that was the form of remittance sheet which defendants had finally adopted and were using universally with respect to all people to whom they made remittances (fol. 238).

Obviously, the plaintiffs were placed in a dilemma by the receipt of that check and remittance sheet, which reached them in New York on the morning of August 8, 1885. On August 10, 1885, the plaintiffs' bookkeeper drew up and signed a receipt for that check, written as follows (fol. 132): "New York, August 10, 1885. Received from Messrs. Jordan, Marsh & Co., ten hundred and eighty-four $\frac{8}{100}$ dollars in settlement *of bill July 22d.*" The receipt, however, *was not transmitted!* On the same day that the check was sent from Boston, to wit, August 7th, Hewes wrote the following confidential letter to the plaintiff Blath (fol. 253):

"BOSTON, August 7th, 1885.

Friend Blath:

I wrote you yesterday, but found my letter was left on my desk unsent. However, I will try again and I think this time it will be all right. Now, I want to take this occasion to tell you to have no uneasiness whatever in regard to your account. No matter what other people may complain of, and to what trouble *they* are put to get a settlement, you may take my assurance that I am particularly interested in *your* account, and propose to protect you, *if you and your partners will give me a chance.* I have passed all bills into the hands of the firm, *with the exception of yours*, and would have put yours in, but I saw trouble ahead for the others, and big trouble at that. It

will be a long day before they will get a settlement, and it serves some of the dirty lot just right, and I do not propose to put you in the same box. I think too much of you and of your house, and I know you think equally well of me. One thing I can tell you in confidence: *I am to be with the house all the same right along*, although I want others to think I am not, or anything they like. *Do your best to prevent any possible way of my house knowing you are in the mess at all*, and if you are asked for a statement, either by letter or any person, by any one, *try and make it appear that you have none to send. You must do this* for *your own* interest and *leave the rest to me.* I will try and see you next week, if possible, and more fully explain things to you. ALL THAT I CAN SAY IN A LETTER is *do as I tell you* and you will be all right. If you want to write me anything between now and Thursday next, send it to No. 5 *Allston Street*, and I will get it quicker. With best regards, I am, yours, J. H. Hewes."

That letter reached New York also on the morning of August 8, 1885. Shortly thereafter the plaintiff Blath went to Boston and spent the day at Hewes' private house in secret consultation with him, endeavoring to discover some way out of the difficult situation. *He confesses he did not go near the defendants* (fol. 261), nor in any way inform them that, over and above the remittance of $1,084.21, which defendants supposed to be in full of everything appearing on plaintiffs' books against them, there was a demand in their favor of much over $30,000. Hewes says that on that occasion Mr. Blath showed him what has been called the "red letter remittance sheet," and that although Blath reached Hewes' house in Boston, before he, Hewes, had got out of bed, and spent the whole day with him, they both finally concluded that there was no way out of the difficulty, and that, unless Blath wanted to sign a full receipt, and so sign away his whole asserted

claim, there was nothing left for him to do but to return to New York and send in a statement of his claim (fol. 225).

Accordingly, after deliberating *for two weeks*, the plaintiffs, on August 24, 1885, write the defendants as follows:

"NEW YORK, August 24, 1885.

Messrs. JORDAN, MARSH & CO.

Dear Sirs,—We herewith enclose receipt for remittance, for which please accept our thanks; also herewith enclose statement of your account as per request. Please excuse delay, *as the person attending to that department has this day returned from his vacation.* Trusting you will find the same correct, we remain, yours respectfully,

SCHUTZ BROS. & BLATH."

That letter is in the handwriting of the plaintiff, Julius Schutz, and his firm signature was written by him (fol. 135). The receipt therein enclosed was the one which had been *drawn up* and dated *two weeks previously*, to wit, August 10th. Thus, although the plaintiffs had been notified by the red-letter remittance sheet of August 7th, that the defendants understood that that remittance of $1,084.21 was in full for everything up to August 1, 1885, *and though they knew Hewes was implicated with other firms also*, and had his letter of August 7, 1885, they remained absolutely silent, and made no communication whatever to the defendants, until August 24th, and this, too, even though Blath had meanwhile been at defendants' store in Boston, hunting Hewes!

We submit, that the human mind cannot conceive that this could possibly have happened if the plaintiffs had not been grossly implicated with Hewes. Of necessity, the moment they received the red-letter remittance sheet, had they been innocent, they would not only have promptly written a detailed statement, but would have even used the

wires in their anxiety to give defendants immediate information; and the plaintiff Blath, being personally in Boston in the meanwhile, would have called on the defendants to enlighten them. Indeed, he himself admits that he was at the defendants' store and inquired for Hewes, but is forced to admit that he did not inquire for the defendants themselves (fol. 261). But just as guilt and fear of the consequence of exposure dictated the extreme delay, so likewise consciousness of the significance of the delay prompted a false explanation of the cause of it; and, accordingly, in their letter of August 24th, they falsely said: "Please excuse delay, as the person attending to that department has this day returned from his vacation" (fol. 135). Plaintiffs had to admit that "the person attending to that department" was their bookkeeper, Mott—the clerk who had sent Hewes the blank-dated invoices, and who had sent defendants the false receipts for their two remittances of July 1st and July 9th; and Mott confirms the plaintiffs in saying that he was the one "attending to that department" (fols. 136 and 150). At first, Mott undertook to say that he had been absent at that time on a vacation; but he had to admit that he was present at the office on August 10th, when he signed the receipt of that date (fol. 135); and, when we compelled him to produce the cash book which he had himself kept, and the letter-press book containing copies of letters which he had himself written from day to day, he was forced to confess that he had not been absent on any vacation, but had been at plaintiffs' office, practically, each and every day during the whole period from August 7, 1885 to August 24, 1885 (fols. 136 and 276).

The "statement," enclosed in the letter of August 24, 1885, showed a claim of over $32,000, which had been heaped up from the month of May *of the preceding year;* some of the items being, as plaintiff Blath told Hewes, "old enough to walk" (fol. 181).

No such delay, however, characterized the defendants. Immediately on receipt of plaintiffs' letter of August 24th the defendants wrote as follows (fol. 138):

"BOSTON, August 25, 1885.

"Messrs. SCHUTZ BROS. & BLATH,
New York.

"Gentlemen,—Yours of yesterday's date is at hand. We are greatly surprised at the statement you sent us. Our remittance of August 7th covered the whole amount of *bills rendered us to date*, and, as we supposed, was in full for all goods delivered to us and not paid for previously, and we therefore could not have requested the statement, as you stated in your letter. We *cannot account* for your *neglecting* to *notify* us of the demands you now make against us, running back so many months, as your statement indicates. *None of the goods which you claim to have been sold us appear on our books of account*, nor have you *at any time* heretofore *made known* to us the existence of such claims. We must, therefore, investigate your claim and ask you for your immediate and full explanation of your *long and unaccountable* silence, and also to send us itemized bill of what you now claim, that we may be enabled to make a full examination into the same.

"Yours respectfully,
"JORDAN, MARSH & Co."

By this letter it will be seen that the defendants accused the plaintiffs "of neglecting to notify us of the demands you now make against us, running back so many months," and the defendants added "we cannot account for it." They then say that none of the goods appeared on their books of account, and add the following pregnant statement: "Nor have you at any time heretofore made known to us the existence of such claims;" adding, with

emphasis, "we must therefore investigate your claim and ask for your *immediate and full* explanation of your long and *unaccountable silence*." This letter reached New York on August 26th.

Being thus accused of having kept the defendants in ignorance of their claim and of not having "rendered" any "bills," and although told that their silence seemed "unaccountable," and urged to give a "full explanation," the plaintiffs replied simply as follows (fol. 139):

"NEW YORK, August 26, 1885.

Mess. JORDAN, MARSH & CO.,
Boston, Mass.

Dear Sirs:

Your letter received, with contents noted, and have sent you to-day registered duplicate bills in accordance with your request. As regards our action in demanding the payment of our account, we have repeatedly instructed our *salesman* while there *to see* to get our acccount settled, and were always told our bills were at the office for payment, and while we continually expected to receive remittance we *did not deem it advisable to push claim*, as we did not wish to lose your custom. We hope you will find everything correct, and remain,

Yours very respectfully,
SCHUTZ BROS. & BLATH."

Thus, it will be seen that substantially they confess that they had not rendered any bills and had done nothing in the way of a direct communication with the defendants, and that all they had done was to instruct their "*salesman*," Robertson, while in Boston "to see to get our account settled!" Under the imputation of having concealed their alleged claim from the defendants, and of never having sent defendants any invoices, charged with having maintained a long-continued and "unaccountable" silence, they were

not willing to assert that they had ever sent invoices to the defendants, or that they had ever sent to defendants "a statement" of their claim, or had ever written or telegraphed them in regard to it, or that they had done anything except have a talk with their "*salesman*," instructing him "to see to get our account settled." At the same time they had to confess that the duties of their "salesman were limited to *selling goods* for them, and that Robertson had nothing to do with the collection of money owing to them, and he testifies to the same (fol. 92); and neither were they willing to let defendants know, even at that late day, August 25th, that they had been carrying on a clandestine correspondence themselves with the defendants' "buyer," Hewes, both by letter and telegraph; thus again practically confessing their consciousness both of the gross impropriety of the secret communications with Hewes, as well also their consciousness that the telegraphic dunning of Hewes was not the equivalent of dunning the defendants themselves, and was not intended to reach the defendants!

Is it any wonder that under these circumstances the jury found that the arrangement between Hewes and the plaintiffs was, as Hewes stated it, that they should co-operate to keep the defendants in ignorance of what was going on? Indeed, the scheme which Hewes was engaged in was one in which not only was success *impossible without the co-operation of the plaintiffs*, but it was also one which he could not have *attempted* to carry out without a previous understanding with the plaintiffs that they would assist him. Because, but for such a previous understanding, he would have known that in the ordinary course the plaintiffs would have probably, in some way, requested payment by the defendants, and thus, *of necessity*, have exposed his concealments and his fraudulent management of his department. A mo-

ment's reflection serves to show conclusively that he would not have dared to have attempted concealment from his principals unless he had had a previous understanding with the plaintiffs that they would assist him in it. And the evidence in support of the defendants' contention in this regard, consisting as it does largely of the conduct of the defendants themselves, and deducible from documents written by themselves and from the entries in their own books, is so conclusive that it would not only have justified a finding in defendants' favor, but would practically have necessitated such a finding, even though Hewes had testified as a witness *for the plaintiffs* on that issue.

II.

Under the circumstances set forth in the testimony, and under the finding of the jury in the light of that evidence, it is not possible to maintain that the defendants entered into any "contract" of purchase.

There was no meeting of minds between the plaintiffs and defendants. In fact, by the arrangement contended for, and found by the jury to have been proven, *the plaintiffs made it impossible* for the defendants' minds to meet theirs! The fact that the goods in controversy may have been received in the establishment of defendants and sold there, and the proceeds turned over to defendants, does not establish a "contract" of purchase by the defendants. This proposition is thoroughly illustrated by all the cases cited under Point I., page 2, *supra.*

It is an old principle of the law that it takes two to make a bargain. It was not in the power of

Schutz Bros. & Blath alone to make Jordan, Marsh & Co. their debtor, *nolens volens*. It is not pretended that any one of the defendants had anything personal to do with the plaintiffs in respect to the goods in controversy. Whatever was done was done by Hewes on the one side and by the plaintiffs and their salesman, Robertson, on the other. Ordinarily, of course, the principal is presumed to know everything which comes to the knowledge of his agent in the ordinary performance of the agent's duty; but, when Hewes conspired with plaintiffs to keep his principals from knowing anything whatever about the transaction between him and the plaintiffs, there is no room for the legal presumption that because he, Hewes, knew of that fraudulent arrangement, therefore his principals knew of it also.

The law will not presume in favor of the conspirators, Schutz Bros. & Blath, that Jordan, Marsh & Co. knew what the conspirators agreed between themselves should not be known. The books are full of cases to the effect that however much one man may come into the possession of another man's goods and the proceeds thereof, still, *even in a case of innocence*, no action upon "contract" can be successfully maintained against him unless it appears that he expressly or by fair implication did contract to pay for them. There is no contract unless there is a meeting of minds; and the ultimate question to be determined in every contract case, where the plea is that there was no contract, is, did the minds of the parties meet? Such a meeting of minds need not be shown by writing, nor by oral communication; it may be shown by conduct; but the conduct must be consistent with and must support the proposition that the minds of the parties met. Where the conduct precludes the idea that the minds of the parties met, then there is no contract, however much the one party may have lost his property, and however

much the other party may have received it and benefited by it.

This is happily illustrated in the case of Saville *vs.* Welch, *supra*. That was a case in which the plaintiff lost his property, and without his own fault; not as was the fact in the case at bar. It was a case in which the plaintiff was practically deprived of his property fraudulently—not by the defendants, it is true, but the defendants received and enjoyed the property; and yet received it in such a way as to preclude the idea that there was any contract between the parties. The facts were these: A was indebted to B, who had a judgment against him for the amount. A desired to obtain some property from B. Having no credit with B, he falsely represented himself to B as the agent of C, and said that C wanted to buy the property. In that way he made terms with B for the property; a price was agreed on, and B shipped the property to C, supposing that he was selling it to C. As a matter of fact C knew nothing about it, and was not buying the property. That being so, as a matter of law B did not lose his title to the property. That is, he had not intended to sell it to A and had not sold it to him; nor had he sold it to C, for the reason that the latter had not bought it. Nevertheless, the property was shipped to C; and B, supposing that he had sold it to C, sent an invoice of the property to C, which C received; so that C got both the goods and the invoice, which invoice set forth that B had sold the property to C. Upon receipt of the goods and the invoice by C, he was approached by A and was told a falsehood, just as A had told a falsehood to B. A told him that he had had the goods shipped in C's name and shipped to him in order to keep them from his, A's, creditors, but that in fact he, A, had bought the goods from B for himself, and that he had had B ship them to C so that A's creditors might not get them, and that B understood the

transaction so. C thereupon delivered the goods to A, together with the invoice, and gave no notice to B that he had done so, because he relied on A's statements. Down to that point it is plain that the wrongdoer, A, had got possession of the goods, but they had been billed to C, who knew nothing whatever about the transaction, except only that he had received the goods and invoice and had surrendered them to A upon A's representation. Thereafter A gave a chattel mortgage on some of the goods to C to secure a debt due to C, and under that mortgage C finally took possession of the goods, and appointed A his agent to sell them. A sold them and turned over the proceeds to C. Thus it appears that B had lost his goods; that he had been tricked out of them by A; that the goods had gone to C who had no title to them. Having lost his goods and the proceeds, and the goods having finally gone to C, and the goods having been billed to C and having been shipped to C, A sued C in "contract" for the price of the goods at the invoice price. This was a remarkably strong case for the plaintiff who was himself perfectly innocent; it being a case too in which he plainly had not lost his title to the property. It was a case too in which the defendant C had received the invoice, the goods and finally the proceeds of the goods. The Court, in a well considered opinion, held that whatever other liability the defendant might be under he was not liable on "contract" to the plaintiff.

In the case of Bolton *vs.* Jones, *supra*, a case in which a plaintiff was out the goods and the defendant received them and got the proceeds of them, the English Court said "as to the claim that the defendants need not pay anybody, I do not see that they should, unless they made a contract, either express or implied."

A similar result followed in the case of the Boston

Ice Company against Potter, *supra*. In that case the defendant received and used ice which he supposed was furnished by the Citizens' Company, with whom he had a contract. Although the plaintiff was innocent and the defendant got the full benefit of the ice and should justly have paid for it, still the Court said, "the question is not whether the defendant has a defense, but whether the plaintiff has a claim." In other words, the plaintiff could not recover on contract unless he had made a contract with the defendant, however much the defendant might have got and used the property, and however much the defendant might be liable in some other form of action.

So in the case of Tascott *vs.* Grace, *supra*, the Supreme Court of Illinois, said, "one man has no right to constitute another his debtor without his consent." This is simply another form of saying that it takes two to make a bargain.

To allow the plaintiffs in the present case to recover from Jordan, Marsh & Co., on the alleged contract sued on would be to say, in the light of the evidence and of the jury's finding, that the plaintiffs could make Jordan, Marsh & Co. their debtor, without Jordan, Marsh & Co. having the poor privilege of saying or *knowing* anything whatever about it!

So too in Earle *vs.* Coburn, *supra*, the title to a horse being in dispute, the plaintiff claimed it belonged to the defendant and the latter claimed it belonged to the plaintiff, in whose possession it was. Plaintiff ordered defendant to remove it, saying if he did not do so, he, plaintiff, would charge defendant for the keep of it. The defendant replied that it was not his horse, and that he had no instructions to give. The plaintiff kept the horse and subsequently sued for his stabling. The horse was subsequently decided to be the property of the defendant. The Supreme Court of Massachusetts held that the only right the plaintiff had was to turn the horse loose.

The Court said "a promise will not necessarily be implied from a benefit derived."

The case of Hills *vs.* Snell, *supra*, is also a singular one. A baker ordered 28 barrels of flour from C. The plaintiff had the flour on storage. By mistake he delivered to the baker 28 barrels of flour belonging to B, which the baker, in ignorance of the mistake, consumed. It was held that the baker was not liable to the plaintiff for the value of the flour, either on contract or in tort for conversion. The Supreme Court of Massachusetts said: "The defendant acquired no title to the flour delivered to him by mistake. He had no contract of purchase with the owner, nor with the plaintiffs, who were bailees of the owner. There was no sale of the flour by the owner nor by the plaintiffs."

Perhaps one of the most striking cases is that of Gray *vs.* Griffith, *supra*. In that case the evidence tended to show a delivery by the plaintiff to the defendant of 20 scythes; a refusal by the defendant to receive them as his; an attempted redelivery to the plaintiff and an acceptance by him of what he supposed to be the same scythes, and a resale of them at auction; and the fact, subsequently discovered, that the defendant had never returned the original scythes, but had fraudulently returned others of an inferior quality. The Supreme Court of Pennsylvania held that there could be no action maintained on the alleged original express "contract;" although they said that the fraud of the defendant might be waived and an action for money had and received could have been maintained for the money which the scythes sold for by the defendants; or the plaintiff could have maintained an action as for the conversion of the scythes.

In Norris *vs.* Lynch, *supra*, an officer took the defendant's horse and wagon, containing liquor, and directed the plaintiff, a stable keeper, to retain them until further orders. When the liquor had been re-

moved, the plaintiff sent word to the defendant that he might have his horse and wagon, and the defendant refused unless they were sent to him. They remained at the plaintiff's stable, the horses were fed by him, and finally the defendant sent for them. Plaintiff then brought an action on contract for the feeding of the horse from the time the liquor was removed. The Massachusetts Court held that "there is nothing to show that there was any contract between the parties, express or implied."

In all of the cases thus cited, the unsuccessful party was the meritorious plaintiff, while in many of them the defendants' conduct was blameworthy, if not fraudulent; still there was no meeting of minds on the question of contract, and there could therefore be no recovery on the theory of contract. In our case, on the evidence and finding of the jury, the plaintiffs are endeavoring to recover on contract, in a case in which they did nothing except to strive to commit a fraud, and in which the mind of the defendants never met theirs nor any one else's in any respect or at any point.

III.

In the light of the evidence, and of the finding of the jury upon the facts, it would plainly be against public policy to permit the plaintiffs to have the relief demanded by them.

The arrangement between the plaintiffs and Hewes contemplated an absolute usurpation by them of the defendants' business and privileges. It meant that the plaintiffs and Hewes should run the business of the defendants secretly and fraudulently as to the defendants, and without the defendants' knowledge,

and without permitting the defendants to exercise real control over their own business. To permit plaintiffs to succeed in such a case would be so plainly encouraging the commission of mercantile fraud that it seems almost inexcusable in us to enlarge upon it.

As will be seen later, the business of Department No. 1 being of vast magnitude, Hewes had so far succeeded in his fraudulent management that he had contrived to conceal bills to the amount of $250,000! If plaintiffs' contention is correct, the defendants would have been put in debt to the amount of about a quarter of million of dollars, not only without their consent or knowledge, but upon the understanding between their servant and the plaintiffs that they should not be *permitted* to know anything about it! If plaintiffs' view is correct, *there was no way* in which the defendants could prevent their premises, their capital, their servants and their business prestige from being subordinated to the wishes and interests of the plaintiffs or anybody else who chose to enter into a similar fraudulent arrangement, nor any way by which they could prevent themselves from being put in plaintiffs' debt. The iniquity of the transaction is so manifest, that if Hewes, who had encouraged it and who was a party to it, had reduced the understanding to writing, and had endorsed upon it his individual guaranty to protect the plaintiffs against loss in the event of their failure to recover from the defendants, there could not, we submit, have been any recovery by plaintiffs even as against Hewes! The Court would say the whole transaction contemplated the gross betrayal of a principal by a trusted servant; it began and ended in abandonment of duty, deception and fraud, and no legal cause of action could arise out of any such corrupt arrangement.

It is not the case of a contract valid in itself, but

affected simply by some fraud *collateral* to the contract, as would be the case where plaintiffs and defendants had entered into a contract through the mediation of a bribed agent. Nor is it a case of an innocent excess of directions as to amount of purchases. Hewes was the "buyer" of Department No. 1, and his right to make honest, actual purchases was not limited to any particular sum. Ours is a case in which on the facts, established by the evidence and found by the jury, *there never was what the law deems a contract at all*, nor anything except a fraudulent contrivance to have the plaintiffs' goods smuggled into the defendants' premises, upon the understanding with the defendants' agent that by some additional deception he would contrive to procure reimbursement for the plaintiffs. For this Court to say that plaintiffs could recover on such a state of facts would be to destroy security in the transaction of business, and to give legal approbation to fraud of a character aggravated in itself and far-reaching in its consequences.

IV.

The Court was bound to direct the jury that the burden of proof was upon the plaintiffs throughout to maintain the proposition set up in their complaint, to wit: That the defendants had "purchased" the goods in controversy from the plaintiffs at prices agreed upon.

The plaintiffs are in error in assuming that the defendants' answer involved a plea of confession and avoidance. The issue raised by the answer was simply sale or no sale. Plaintiffs alleged a sale; de-

fendants, in their answer, denied it; defendants then needlessly, but out of superabundant caution, went on to plead *argumentatively*, by pleading what they claimed the real transaction was, and asserted that *because* the transaction was such as was claimed by the defendants, it was, *therefore*, no sale. The answer did not admit that there had been a contract of sale, and then seek to avoid it for fraud *in* the sale. Throughout, the defendants denied that there was a sale. *That was the only issue.* The plaintiffs sought to establish the affirmative of that issue by the evidence of the salesman Robertson. The Court distinctly and repeatedly told the jury that *if they believed Robertson's testimony to be true*, then the sale was established, and that the plaintiffs should in that event have a verdict for the full amount claimed, no matter how much Hewes may have defrauded the defendants; *but the Court added that the burden was on the plaintiffs throughout to make the jury believe Robertson's testimony.* As Robertson stated the transaction between himself and Hewes, it was a sale. Hewes, however, stated the transaction differently. And all the documentary and circumstantial evidence in the case antagonized the contention of Robertson. As Hewes stated the transaction, it was merely an arrangement to smuggle goods into the defendants' establishment, and to procure reimbursement therefor by various false devices. There was thus no time in the case at which the burden of proof shifted to the defendants. There was no item of evidence introduced by the plaintiffs the truth of which was admitted by the defendants.

There are many cases in the reports in which, although plaintiff has the burden of proof, yet, upon the introduction of certain uncontested evidence, the burden may shift to the defendant to overcome the effect of the evidence introduced, which, if unattacked or unexplained, would be conclusive in plain-

tiff's favor. For example, assume the case of a plaintiff suing a bank for money deposited in the bank. Suppose the fact of deposit be denied and that there should be no other issue. Suppose, on the trial, the plaintiff introduces a pass-book given to him by the bank, and in which the amount of his deposit is entered in the handwriting of the bank's receiving teller. Suppose there is no dispute as to the genuineness and origin of the book and of the entry therein. Suppose these facts were proven by the bank itself; obviously, although the burden of proof was upon the plaintiff at the start, the burden would shift upon the introduction of the book containing such entry, and it would then remain for the defendant to show that the entry in the book was an error, or to explain it in some way, if there was no other issue in the case than the question whether the money had ever been deposited or not. And in such a case it might be said that the burden of proof at a certain point in the trial shifted to the defendant. It would be more accurate to say, however, even in that case, that the burden of proof was on the plaintiff throughout, and that he had supported the burden and made out his contention, and that the Court should direct a verdict in his favor unless some countervailing evidence was introduced. The numerous cases cited by the plaintiffs in their elaborate brief are cases of this character.

In the case at bar, had the defendants introduced no testimony whatever, had the whole evidence consisted in the testimony of Robertson to the fact of sale, then and in that case Robertson's testimony would have been uncontradicted; and if not open to suspicion or question would have necessitated a direction of a verdict for the plaintiffs.

But the defendants throughout stood denying the truth of Robertson's testimony and impeaching it, not only by the direct evidence of Hewes, but by the

conduct of Robertson himself and by the conduct of the defendants themselves. And merely because the defendants undertook to contradict Robertson's testimony the burden did not for that reason cease to be with the plaintiffs to satisfy the jury that Robertson told the truth. It was in this case as in any other in which there is a denial of the plaintiffs' allegations, and in which the evidence introduced by plaintiffs is challenged throughout. In such a case where the whole evidence of plaintiff is challenged the burden never ceases to be with the plaintiffs to satisfy the jury of their contention.

On page 32 of plaintiffs' brief they say "in a case like this, *all the elements of a sale being shown and not disputed*, and a fraudulent conspiracy or arrangement being alleged as a matter of defense, * * * we claim that the burden of proof was upon the *defendants* to establish the facts alleged to overcome the evidence of the sale."

That statement is erroneous. The elements of a sale *were* disputed. Robertson testified to certain matters and claimed that he had thus told *all* that transpired between himself and Hewes. He denied there was any fraudulent arrangement between himself and Hewes. The defendants assail that statement of Robertson by the testimony of Hewes, and by all the other great mass of evidence in the case, and it was *that* contention upon which the case mainly hinged.

Neither is this a case of a purchase by Hewes, but in excess of his authority in respect to amount. It is a case in which we say that it was understood from the start between Hewes and Robertson that the defendants should not be permitted *to know anything about the transactions;* so that there was no contract of purchase by the defendants at all. And the whole question on this branch of the case was did Robertson tell the truth, or did he not tell the truth. There was no presump-

tion one way or the other; just as there was no presumption one way or the other as to the testimony of Hewes. A certain transaction had taken place between them. Each gave his version of it. If it was as Robertson stated it, the jury was directed to give plaintiffs a verdict. Unless it was so they were not permitted to give plaintiffs a verdict, unless it was upon another proposition in the case. Nothing was said by us as an *avoidance* of an alleged "contract;" everything was in *denial* of it. The numerous erroneous statements by the plaintiffs of the Court's position during the trial are all the outgrowth of the mistaken idea that the allegation of a "contract" of "sale" was conceded by the defendants, and that the controversy which was tried out was not whether there had been a *sale* or not, but whether there was not some fact *collateral* to the supposed sale that vitiated it. Of course, if the defendants had at any time in any way *conceded* the alleged fact of *purchase* by them, and had merely sought to *avoid* such purchase by some *collateral* fraud, the burden would then have been on the defendants to have established such fraud; but the real issue was whether the defendants had ever in any way made a "contract" to "purchase" the goods sued for, or whether the transaction was simply the smuggling of plaintiffs' goods into the defendants' establishment without the goods being "purchased" at all. That issue was presented by the Court to the jury in a charge that was as fair to plaintiffs as it could possibly have been. One has only to read the charge a single time in order to apprehend and understand the issue with as much clearness as one can understand his native alphabet. It is true that in contradicting the evidence of Robertson and in showing that his testimony was untrue, and that he did not tell all that took place between him and Hewes, the evidence adduced by the defendants showed not only that

there had been no sale, but that the real transaction between the parties, when fully laid before the jury, was a mere fraudulent contrivance to enable Hewes to manage his employers' business in fraud of his employers, and that whatever goods were furnished him by the plaintiffs were furnished him, simply for and in pursuance of that fraudulent purpose; but still, nevertheless, the fact remains that this latter truthful showing was introduced simply to antagonize and destroy the disputed and untruthful evidence of Robertson; it was not introduced as admitting the truth of Robertson's evidence that he was telling the whole story, and as seeking to avoid its effect by some independent, new, collateral matter of an affirmative nature, consistent with the idea of a "contract" of "sale" and "purchase" of goods. The present case is like any other in which the plaintiffs allege a sale and defendants deny it, and in which the plaintiffs seek to establish their contention by the evidence of the party who represented them in the alleged contract, and whose evidence is contradicted, whose truthfulness is challenged, and as to whom it is claimed and shown that he did not tell the truth in regard to the alleged "contract." In such a case the burden remains throughout with the plaintiffs to vindicate the witness thus relied upon by them. Less than that the Court could not have required of the plaintiffs.

V.

There is no room for the application of the doctrine of "ratification" in this action.

The issue in the case being whether or not the goods sued for had ever been *sold* by the plaintiffs

and *bought* by the defendants, and it being conceded that whatever was done was done with Hewes, and that he had a general authority to buy goods for the defendants in their cloak and suit department in the fair course of business, then, if what Hewes thus did amounted in law to a *purchase* by the defendants, *that ends the case;* but if what he then did did not amount in law even to an attempt to make a "contract" of purchase of these goods by the defendants, but was a mere smuggling arrangement, then *there was no "contract" to "ratify."*

If anything with respect to the original transaction between Hewes and Robertson is established by the verdict of the jury in this case, it is, *first*, that the mind of Jordan, Marsh & Co. did not meet the mind of Schutz Bros. & Blath upon any contract of purchase; and *second*, that the real transaction between the plaintiffs and Hewes amounted simply to a furnishing of goods to enable Hewes to commit a fraud upon his employers. That being so, there was, of course, no "purchase" by the defendants; *nor any intention* even on Robertson's and Hewes' part *that there should in law be a purchase.* In other words, Hewes and Robertson, being presumed to know the law, knew that the transaction between them, as found by the jury, did not amount in law to a contract of sale and purchase; but that it amounted simply to a smuggling of the goods into defendants' premises. In law *this latter* is all that both Hewes and Robertson intended, except as they also intended, by indirection and deceit, to transfer a certain amount of the defendants' money to the plaintiffs. On the facts, as found by the jury, *neither one* contemplated a "contract" of "purchase"!

The plaintiffs contend that the retention of the goods and proceeds by the defendants, whether consciously or unconsciously, established "ratification" of Hewes' acts, sufficient to bind them for

the "purchases" by Hewes, made of the plaintiffs. Here we have "confusion worse confounded." The simple fact is that if Hewes "purchased" the goods for the defendants there was no need of ratification. We conceded his authority to "purchase" for them, and indeed the Court so charged the jury. If, however, he did not "purchase" the goods, then any "ratification" must of necessity have been simply a ratification of the *transaction such as it was!* Whether such a "ratification" could have created a liability upon some other ground than that of "contract" is not now before the Court, and hence "calls for no special discussion. But obviously *such* a "ratification" could not metamorphose a *swindle* into a "contract"!

Unjustly, as we submit, as against the defendants the Court below did however give the plaintiffs the opportunity of obtaining a verdict, in the event that the jury found the facts which the plaintiffs claimed constituted a ratification; that is to say, the Court instructed the jury that even though the arrangement between Hewes and Robertson was such as was testified to by Robertson, then and in that event the plaintiffs must have a verdict for the full amount, however much Hewes may have defrauded his principals. But the Court further charged that, even though the arrangement between Hewes and Robertson contemplated a mere smuggling of the goods into the defendants' premises, nevertheless the plaintiffs could recover in the present action on "contract" if the jury should find from the evidence that the defendants *succeeded in discovering the fraud that was being practiced upon them.* We maintain that in so doing the Court committed an error as against the defendants; but *that* is something of which the plaintiffs cannot complain. We submit that that was an error for two reasons; first, because the discovery of a swindle does not convert it into a contract; and second, because there was no

evidence whatever that would have justified a finding that the defendants had made any discovery as to these plaintiffs prior to the final discovery in August, 1885.

In connection with this latter suggestion it is proper that the Court should know how it was that Hewes succeeded in the accomplishment of his fraud without being discovered by his principals.

As was testified to both by him and defendants' bookkeeper, Bassett, and by Gardham, the system of receiving and distributing mail matter at defendants' place was such as has been heretofore explained; to this there was no contradiction and no room for any contradiction; and accordingly Hewes told Robertson at the outset that "invoices" might be safely sent, addressed Jordan, Marsh & Co., as he, Hewes, would get them anyhow and would keep them. So that neither any member of Jordan, Marsh & Co., nor any other person in their employ, except Hewes, saw those invoices. The plaintiffs' bookkeeper, Mott, and their salesman, Robertson, as well also the plaintiffs, understood that Hewes was concealing those invoices, and for that reason it was that Mott and the salesman Robertson gave Hewes the blank-dated invoices. And that the bookkeeper and the plaintiffs understood that the defendants had not received the invoices, but that Hewes did have them and had suppressed them, is practically confessed by the correspondence that took place in August, in which, when charged with having concealed their claim, they failed to say that they had regularly sent the firm invoices with each shipment of goods —a statement which they would inevitably have made if such had been the fact.

It is true that in their letter of August 26th they did say that they were "always told our bills were at the office for payment;" but if they had mailed any invoices to Jordan, Marsh & Co., without

any understanding that they were to be suppressed, they would simply have asserted the fact as proof of their innocence. The fact of their knowledge that their invoices were to be suppressed is also practically confessed by the plaintiff Blath by the fact that when he received the incriminating letter written to him by Hewes on August 7th, he silently acquiesces in all its statements and resented none of them. But whether the plaintiffs were aware or unaware of the fact, no jury could have found in the case or have been warranted in finding that any one of the defendants had individually seen the "invoices" referred to. The same observation can be made with reference to the "statements" of account, which plaintiffs claim they had sent to Jordan, Marsh & Co., and which in the ordinary course of mail would not have gone to Hewes. The defendants' bookkeeper, Bassett, denied ever having received any such statements, and they would have gone to him had there been such (fol. 153). He further said that when the plaintiffs' books were examined by him after the exposure, the plaintiffs' bookkeeper, Mott, confessed in the presence of the plaintiffs that no statements had ever been sent, and excused himself for not sending such statements by saying that he did not want to dun the house (fols. 154 and 172). The surreptitious correspondence with Hewes by letter and telegraph in the spring and summer of 1885 showed a perfect consciousness on plaintiffs' part that they had never sent anything which was intended to reach or did reach the defendants personally. Moreover, it cannot be supposed that if they had sent any such statements they would have failed to say so in their August letters, or that they would have hesitated from August 8th to August 24th in acknowledging receipt of the red-letter remittance sheet; or that they would have failed after the receipt of the remittance sheet to communicate

instantly with the defendants; or that Blath would have failed to call on the defendants when at their place of business in Boston after the receipt of the red-letter remittance sheet at the time he was hunting for and spending the day with Hewes; or that he would have accepted Hewes' letter without resenting it; or that any of the false receipts would have been given by the plaintiffs. The fact is that these "statements" were made out and copied in plaintiffs' letter book and then given to Hewes, as testified to by him, for his guidance (fol. 186); and the idea that they were mailed to the defendants direct was an afterthought, which no jury, in the light of the plaintiffs' own evidence and conduct, would have been warranted in finding to be true.

As to the goods themselves, Hewes obtained them from the receiving room by deceiving Erlacher, the man in charge thereof, by telling him that he, Hewes, had examined all the goods, and that they were correct (fol. 185). Hewes having been in the house many years, and being trusted, was believed by Erlacher, who thus considered himself relieved of that much labor; and, believing Hewes, he suffered him to take the goods, Erlacher "O. K.'ing" the invoices, which thereupon Hewes appropriated and concealed.

The goods thus fraudulently acquired by Hewes from the plaintiffs and others were not all taken into Hewes' department in bulk or at any one time. They went into the department from time to time, in different lots, and were kept on counters and under counters and in drawers and in boxes (fols. 190 and 230), so that a person passing through the department could not tell what amount of goods were therein at any one time (fol. 230). Being from time to time overstocked with goods, and trade not being as brisk as he had expected, Hewes felt himself under the necessity of selling goods at any sacrifice. Had Hewes' expectations as to trade been realized, had

he been able to handle advantageously the large quantity of goods he obtained, he would have been able to "pass bills" sufficient in amount to have reimbursed the plaintiffs and the other parties implicated, and in that case he might never have been discovered by his principals; for there would have been no disproportion between his sales, purchases and remittances. But his expectations were not realized, and the unwisdom of his attempt to carry in his department a larger stock than he was willing to permit his employers to be aware of was demonstrated. The invoices of the plaintiffs, and others which he secreted, were but a fraction of his aggregate purchases for his department; and as he did not report them, and as the amounts of them were thus kept off the Entire Book, there was no disparity apparent to the defendants between the purchases for the department as reported and entered in the books and the reported amount of sales from time to time. So that there was nothing in the weekly reports that were laid before them, and which were made up from the books, that showed an amount of sales beyond what was reasonable with reference to the amount of stock which the weekly statements showed to be in the department (fols. 234 and 235). Nor would a visit to the department by either of the defendants disclose to them that there was any more stock in the department at any particular time than was represented upon the weekly statements laid before them (fols. 232 and 190). This was testified to not only by Hewes but by Gardham and Shore, and there is nothing to the contrary; and it stands to reason that if the defendants had become suspicious there would have been an investigation and a probable discovery.

To support the proposition of ratification, it is for the plaintiffs to show affirmatively the discovery by the defendants of the facts constituting the ratification. The defendants are under no obligation to

affirmatively *show that they did not make the alleged discovery;* and there is not an item of testimony in the whole record tending to show any discovery whatever until the time of the confession in July, 1885; and that confession did not incriminate these plaintiffs. *They* were not discovered until the end of August.

As to such goods as were on hand at the time of that July discovery, suffice it to say that there is no evidence tending to show that the defendants themselves knew whose goods they were, or could determine whether they were goods that had been paid for or had not been paid for (fols. 230 and 227). At all events, it was for the plaintiffs to show just what amount of goods there were and that they were unpaid for. But, as already shown, even that would not have created a liability as upon a "contract" or "purchase."

It must be remembered that the natural and inevitable consequence of having the department overstocked was that a sacrifice followed. Goods were marked down promiscuously and not entered in the marked-down book (fols. 187, 231 and 245). To have reported such mark-downs would have disclosed an amount of sacrifice which Hewes was unwilling to let the defendants know of. It might very well be that the smuggled goods, which created the plethora of stock, may themselves have been sold at fair prices; and it may have been that it was the fairly bought goods that were sacrificed in price. How that may be can never be absolutely known.

But as his department was not debited in the Entire Book with the amounts of the secreted invoices, and as he therefore did not have to account upon the books for that amount thus not appearing on the books and not charged to him, so likewise there was no occasion for him to have credit upon the mark-down book and through it upon the Entire Book for the amount of the mark-downs. Then,

too, he was not exposed when an actual inventory of stock was taken in his department twice a year, because, being trusted and having charge of that department, the inventory was thus taken under his direction, and the slips of paper containing an account of it were laid before him, and he suppressed such of the slips as he chose to suppress. In short, the deception which was initiated by the agreement between him and the plaintiffs gave rise to all the other deceptions that followed, as is generally if not always the case;—a lie being generally the father of many others.

The result of all this is that the only issue which, under the evidence, the plaintiffs were entitled to have submitted to the jury, or which, under the evidence they were entitled to have found in their favor, was the first issue, to wit, whether or not the original transaction between Hewes and the plaintiffs amounted in law to "a contract" of "purchase" by the defendants; and that issue was submitted under a charge that was unobjectionable and without any substantial suggestion of error in respect to the admission or exclusion of evidence relating to it; for all the evidence, which tended to illustrate the conflicting contentions as to that original transaction between Hewes and the plaintiffs, was sedulously admitted by the Court; and upon that evidence there could be only the result which followed.

VI.

There was no error in the Court's charge, or in its refusal to charge, upon the question of the effect of the alleged mailing of "invoices" by the plaintiffs.

Upon this matter the Court told the jury that there was evidence of the plaintiffs tending to show

that they had mailed the "invoices," but he said "the fact that a letter is mailed does not *establish* the fact that the person it is mailed to *received it*. That is no proof of the fact. In certain transactions about protesting notes and charging endorsers of commercial paper and things of that sort, the mere fact of mailing a letter answers; but when a party is to be affected with knowledge of what is in the letter, and the contents of it and what goes with it, they must go further and prove not only that it was mailed but that the party to whom it was addressed got it. Now, as I said, the fact that a letter was mailed by the plaintiffs would have a bearing as showing how they understood the matter and how they acted in regard to it; but, unless the proof shows that the defendants *got the letter* and what was with it, does not affect them in their conduct with it."

The exception to that part of the charge is found at page 160, folio 302, and is as follows:

"I except to the charge that the fact that the plaintiffs mailed the letter claimed to have been mailed, while it bears on the good faith of the plaintiff does not affect the defendants *unless the letters were received*;" and again:

"I except to the charge that although mailing of notices of protest of a note for instance, is sufficient to charge a party who does not receive it, yet, where a party is to be affected with the knowledge of the contents of letters, as understood in this case, the plaintiffs must go further and show that the party to whom it was addressed got it."

Obviously, there is no merit in either one of these exceptions.

The plaintiffs took an ultra view of this matter, and asked the Court to charge as follows (p. 158, fol. 298):

"Mr. Choate: I ask your Honor to charge, as to the matter of receipt of letters and other communi-

cations *proved to have been mailed* by the plaintiffs to the defendants, that in the absence of proof *from each defendant* that such letters, &c., were not received *by any one of them*, the mailing is *prima facie* evidence of the fact of receipt."

To which Mr. Choate added: "What I ask is that the fact of mailing, in the absence of any denial by *each one* of the defendants of receipt, is *prima facie* evidence that it was received."

And to the Court's refusal to give that charge, the plaintiffs excepted (fol. 298).

In view of what has been hereinbefore advanced, it would seem to be quite unimportant whether there was any error in these rulings as mere abstract propositions of law or not; for as already shown, it is perfectly clear that on the whole evidence the "invoices" and "statements" never reached the defendants' personal possession, and no jury would have been justified in so finding; and furthermore, even if they had passed under the eye of the defendants, nevertheless it would have resulted at most merely in a discovery by them of the fraudulent scheme between Hewes and the plaintiffs; and, as above shown, the discovery of the fraud would not have converted it into a contract of purchase.

But, aside from this, these requests to charge ignored not only all the documentary and circumstantial evidence in the case, but they ignored the uncontradicted evidence as to the system which prevailed in defendants' premises for the reception, opening and distribution of mail, and under all of which evidence the jury would not have been justified in finding that the documents did, in fact, reach the plaintiffs' personal possession.

Furthermore, the Court, in its charge, did give the jury the privilege of finding that the invoices and other documents were received by the defendants personally; and it gave the jury the privilege of so

finding *upon no other evidence than the mere evidence of the plaintiffs that the same were mailed*, addressed Jordan, Marsh & Co., so that, under the Court's charge the plaintiffs had all the advantage resulting from the mere fact of mailing to which they could possibly have been legally entitled. It would have been gross error for the Court to have given the requests asked for by the plaintiffs, which requests attributed far too much importance to the failure of each of the defendants to deny a personal receipt by him of the documents alleged to have been mailed, especially in view of the evidence of the system under which the invoices reached Hewes.

There is no rule of law that requires a personal denial by each member of the firm. There is no presumption that each member of the firm addressed received the document personally, and hence there is no presumption that any particular one of them did. In the present case Mr. Marsh was dead at the time of the trial. If his denial was a necessity, then in the language of plaintiffs' counsel the plaintiffs would have been absolutely entitled to a direction of a verdict in their favor. But it was shown without contradiction that the documents referred to took such a course in the defendants' business as that they would not go before the defendants personally; nor, except as to Hewes, did it appear that they would go before any person authorized to *contract* on behalf of the defendants in respect to that cloak and suit department. On the contrary, as to the "invoices" it was affirmatively shown that they would go to the "buyer" of the department, and that in the present case they did go to him and were pocketed by him, in pursuance of his understanding with the plaintiffs; and as to the "statements," it appears that they would go to Bassett.

We submit that the most that the plaintiffs could ask of the Court was that the Court should give the jury the privilege of finding, from the mere fact of

mailing, that the documents were actually received by the defendants personally; for the plaintiffs introduced no evidence tending to show actual receipt of the documents by the defendants personally except the mere fact of mailing; and from that fact the Court did give the jury the privilege of finding receipt. The plaintiff certainly had no right to have the Court tell the jury that the fact of mailing established or proved the fact of receipt; nor did they have any right to have the Court direct the jury that they should find that the documents were received by the defendants personally in the absence of a personal denial by *each of them* that they did receive the documents. Especially is this true in the light of all the documentary and circumstantial evidence in the case, and the uncontradicted evidence as to the course of mail matter in defendants' business.

The situation shown by the evidence was essentially different from one in which a letter is mailed to an individual, properly addressed and stamped, and in regard to which there is absolutely no evidence, except only that the letter was thus mailed, properly stamped and addressed to the correct address of the individual. The numerous authorities cited by the plaintiffs are cases of *that* character. But even in those cases the jury is not *bound* to find, though perhaps it should find, that the letter so addressed was received by the individual to whom sent.

But, as already shown, it was proven in the present case, with almost mathematical precision, that the plaintiffs themselves well knew that Hewes received and held the different documents referred to. The whole mass of evidence in the case is consistent with that theory, and absolutely inconsistent with any other. In no other way can any rational explanation be given for the giving to Hewes of duplicated blank-dated "invoices," or for the unusual

circumstance of keeping Hewes' name at the head of the ledger account, or for the failure of plaintiffs to demand their money either in person or by letter of the defendants personally, or for their giving false and misleading receipts for the two remittances made to them on the fictitious blank-dated bills falsely filled in and passed by Hewes, or for their daily telegraphic clandestine duns to Hewes during the spring and summer of 1885, when they well knew that Hewes was the buyer and not the payer, and that if they wanted money they should have applied in ordinary business course to the *defendants*, or for their extraordinary conduct, *practically their clear confession*, on receipt of the red-letter remittance sheet and check of August 7, 1885, followed as it was by the correspondence that grew out of the same; or for the private letter of Hewes to Blath, and the latter's failure to resent the same.

What we are here contending for is not merely that all this evidence took the place of a personal denial by the individual defendants that they had received the documents alleged to have been mailed to them. We are contending for the proposition that the evidence so clearly and conclusively established a secret combination between the plaintiffs and Hewes that the Court could justly have given the jury a direction on that point, and should not have given the jury even the privilege, under the circumstances, of finding to the contrary.

We think the defendants had a right to have the question of collusion between Hewes and the plaintiffs withdrawn from the jury. At all events, a finding to the contrary should have been set aside, and there is no reason to suppose that on all the facts of the case any different conclusion could ever be reached by any other jury. No matter what the charge of the Court might be on the subject of mailing, if the question of fact in this case should

ever again be submitted to another jury it would be bound to find that there was a conspiracy between Hewes and the plaintiffs, that the conspirators succeeded in preventing a discovery and that they knew they had succeeded. No other verdict should be allowed to stand. This construction alone disposes of all the technical questions arising on the numerous exceptions.

On the finding of the jury the goods were furnished to Hewes for a dishonest purpose, namely, to enable Hewes to carry on his department deceitfully and fradulently as against his employers. In such a case the Court should act, not so as to encourage but so as to discourage a repetition of such transactions. It should do this, not for the sake of the defendants merely, but for the sake of good morals and the public. The Court should leave such plaintiffs where they have placed themselves. Discovery of their conduct, whether by "invoices" or "statements" or by any other means not only creates no "contract," but should create no claim of any sort that should be recognized by a court of justice. If the transaction with Hewes had been written out *in extenso*, and if Hewes had appended an agreement that he would make the plaintiffs whole in the event that he failed to fraudulently obtain their moneys from the defendants, even in that case we submit no cause of action could arise as against Hewes that would be enforced by the law, for the reason that the underlying principle of the entire transaction was fraudulent. It seems to us that if this latter proposition be clear it effectually disposes of every point raised in the case by the plaintiffs. And this proposition as to the original understanding between Hewes and the plaintiffs was found by the jury. And that understanding, as stated by Hewes, involved the statements that "invoices" might be sent "anyhow," as they would come to him.

VII.

The fact that one of the defendants, Eben D. Jordan, was absent from Boston for some months while plaintiffs' smuggling was going on cannot avail the plaintiffs.

The plaintiffs asked the Court, (fol. 304) to direct the jury to give them a verdict for $23,338.66, being the amount of goods smuggled into defendants' establishment during the time Eben D. Jordan was absent from this country. The Court refused to so charge, and the plaintiffs excepted.

The contention of the plaintiffs in this regard comes to this: even though what transpired between plaintiffs and Hewes was not a sale but a mere fraudulent contrivance to smuggle goods, nevertheless, if one of the parties intended to be defrauded was absent from the country during the perpetration of the fraud, that fact alone sanctifies the fraud, and converted it into a contract of sale. To say the least of it, this seems to us to be laying rather a novel restraining influence upon foreign travel.

VIII.

There is nothing in the proposition that after the discovery of the fraud a selection was made of goods which had been smuggled into defendants' store and which still remained unsold.

It seems that on the discovery that certain parties had smuggled goods into defendants' store, but long

before the plaintiffs' complicity had been discovered, the defendants caused Hewes to select from stock on hand such goods as had come from the the different parties who had furnished him goods fraudulently. A few thousand dollars of goods were thus selected. It was difficult to distinguish the goods of one party from those of another for the reason that such goods frequently resembled each other in style, and the original tickets had been taken from them when they were first put in stock, and the tickets of Jordan, Marsh & Co. put on them instead. Nobody about defendants' establishment could identify such goods except Hewes, and even he could not be certain as to the identification. Moreover, no one, not even Hewes, could tell whether or not the particular goods still on hand unsold had been paid for or not. There was nothing, therefore, left to do but to put such goods back in stock. Certainly, nothing in that transaction could by any possibility support plaintiffs' present contention of a claim of contract for goods sold and delivered at agreed prices.

IX.

There was no error in the Court's refusal to permit the plaintiffs to amend their complaint.

At the close of defendants' case plaintiffs moved "to amend the complaint by adding to it a count for money had and received to the same amount as is claimed in the count of goods sold and delivered" (fol. 279). This was refused and plaintiffs excepted.

The amendment attempted during the trial was one prohibited by Section 723 of the New York

Code, upon which section plaintiffs relied. That section vests a discretion in the Court to permit an amendment during the trial, without requiring the Court however to do so; such amendment, however, being limited to cases of error in the names of parties or to an amendment which should "not change substantially the claim." The proposed amendment not merely substantially changed the claim; it contradicted it. While the original complaint proceeded upon the idea that the goods in controversy were sold and delivered to the defendants and became the property of the defendants, the plaintiffs being entitled merely to the sale price, the proposed amendment proceeded on the idea that the goods in controversy, after being delivered to the defendants were still the property of the plaintiffs, and that the proceeds thereof were the property of the plaintiffs, had and received by the defendants to the plaintiffs' use. The two causes of action were utterly inconsistent with each other. If the first cause of action was well founded, the goods upon the sale became the property of the defendants, in which event the latter could not be liable to the plaintiffs as for the proceeds thereof; if, on the other hand, the goods remained the property of the plaintiffs, then they were not sold and delivered to the defendants. Moreover, the defendants had not come prepared to try the issue covered by the proposed amendment. In no event, however, were the plaintiffs injured by the Court's action in that regard. If the plaintiffs had a well-founded cause of action for money had and received, it was optional with them to institute an action therefor. All that the Court decided was, that they could not interject a cause of action of that sort in that present proceeding at that time under the then existing circumstances, and thereby seek to maintain an attachment

which they had obtained upon quite another and contradictory cause of action.

X.

The only error made by the Court below was in submitting to the jury any issue whatever except only as to the nature of the original transaction between Robertson and Hewes.

It seems to us that since it was determined under a proper charge that the original transaction between Hewes and Robertson contemplated a mere fraudulent smuggling of goods, it followed that nothing equivalent to what the law considers a contract of sale was intended *by either party*. That being so, all the other evidence in the case could not possibly justify a verdict in plaintiffs' favor on the present cause of action, and it was error to give the plaintiffs an opportunity of obtaining a verdict on any other ground. It was just as essential that a *contract of sale* should have been intended by the *plaintiffs* as that a *contract of purchase* should have been intended by the *defendants*. The jury's finding having established that *no sale was ever intended*, it necessarily follows that any uncommunicated, unilateral act of the defendants could not, *ipso facto*, work a "meeting of minds." Nor would a "contract" result merely because the defendants might possibly have discovered some of the paraphernalia in which the original fraud was masquerading; for, under the jury's finding the "invoices," which (by the original understanding between Hewes and Robertson) went to "Hewes

anyhow," were merely a portion of the dress by which the fraudulent transaction was sought to be given some of the habiliments of a legal contract.

No case more clearly illustrates the necessity of a reciprocal and corresponding intent to create a "contract" relation than the case of *Gray* vs. *Griffith*, 10 Watts, 431.

XI.

The judgment should be affirmed, with costs to the defendants in error.

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